CLERK'S COPY. 25858

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 223.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

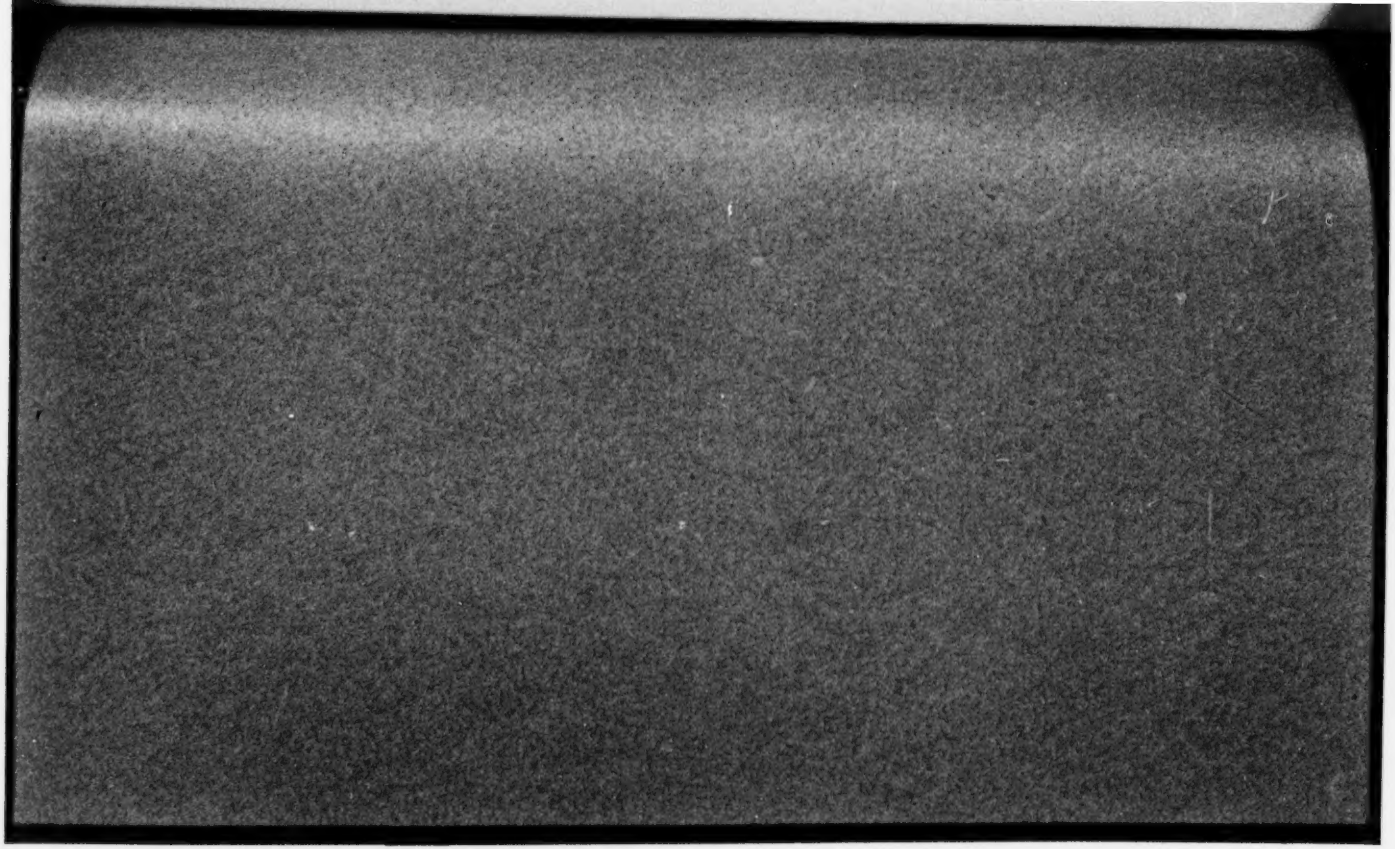
vs.

SAMUEL E. WATSON.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JANUARY 16, 1902.

(18,371.)



(18,371.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902

No. 223.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL E. WATSON.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print.
ption.	a	1
anscript from the circuit court of the United States for the eastern district of Texas	1	1
Caption	1	1
Transcript from State court	1	1
Election of special judge, State court	1	1
Plaintiff's original petition	2	2
Citation and sheriff's return	4	4
Defendant's original answer	5	5
Plaintiff's first amended original petition	6	6
Defendant's first amended original answer	9	9
Petition for removal to United States circuit court	12	11
Bond for removal	13	12
Order granting removal	15	14
Orders granting parties leave to amend	15	14
Clerk's certificate	15	14
Defendant's second amended original answer	16	14
Exhibit A—Lease from T. & P. R'y Co. to W. S. Thompson	18	17
B—Lease from T. & P. R'y Co. to Messrs. O'Neill & Gaines	19	17

Washington, D. C., February 11, 1903.

	Original.	Print
Plaintiff's first supplemental petition	20	18
Defendant's general demurrer and second special exception overruled	21	19
Judgment	22	20
Motion for a new trial	23	20
Order overruling motion for new trial	24	22
Motion for sixty days to prepare bill of exceptions, &c	25	22
Order granting sixty days	25	23
Bill of exceptions	26	23
Testimony of Lon. Martin for plaintiff	27	24
Hays Lane for plaintiff	28	25
James Aydelote for plaintiff	28	25
Lee Cooper for plaintiff	29	25
Sam Taylor for plaintiff	29	26
Frank Moore for plaintiff	30	27
J. E. Srygley for plaintiff	30	27
Andrew Deaver for plaintiff	31	27
H. A. Green for plaintiff	32	28
L. A. Rains for plaintiff	33	29
Testimony for defendant	34	29
Testimony of A. A. Campbell for defendant	35	30
C. H. Traver for defendant	36	31
Ed. Van Housen for defendant	36	31
J. W. Chisholm for defendant	37	32
O. M. Seegar for defendant	38	33
W. W. Laing for defendant	38	33
C. M. Wells for defendant	39	33
S. E. Watson for defendant	41	35
Ed. Van Housen for defendant	42	36
B. F. Caperton for plaintiff	42	36
J. W. O'Neal for plaintiff	43	37
C. E. Williams for plaintiff	44	38
B. F. Caperton for defendant	45	38
Charge of the court	45	39
Assignment of errors	48	41
Application for writ of error	51	44
Application for summons and severance	53	45
Order on application for summons and severance	54	45
Waiver of citation, &c	55	47
Bond on writ of error	55	47
Clerk's certificate	57	48
Writ of error	57	49
Argument and submission	59	50
Judgment	60	50
Opinion of the court	61	50
Assignment of errors	64	51
Bond for writ of error	70	56
Writ of error	71	57
Citation and service	72	57
Certificate of clerk	73	58

a *Caption.*

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1901, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, *vs.* S. E. WATSON, Defendant in Error. } No. 1035.

Be it remembered that heretofore to wit, on the 25th day of February, 1901, a transcript of the record of the above styled and numbered cause, from the circuit court of the United States, for the eastern district of Texas, was filed in the office of the clerk of said United States circuit court of appeals, for the fifth circuit, in the words and figures following to wit:

1 Be it remembered, that at a regular term of the honorable circuit court of the United States for the eastern district of Texas, in the fifth circuit, begun and holden at Paris, Texas, on the 19th day of November, A. D. 1900, and which adjourned *sine die* on the 27th day of November, A. D. 1900, at which the Honorable David E. Bryant, United States district judge for the eastern district of Texas, presided, there came on for trial cause No. 84 on the law docket of said court, styled S. E. Watson, *et al.*, *vs.* The Texas and Pacific Railway Company, when the proceedings following were had, to wit:

THE STATE OF TEXAS, }
Red River County. }

At a term of the district court, begun at Clarksville, within and for the county of Red River by the Hon. V. W. Hale, who was on the 2nd day of this court duly and legally elected special judge of the district court of Red River county, Texas; the record of which election is as follows, viz:

TUESDAY, *May* 25, 1897.

On this day the Hon. E. D. McClellan, judge of the sixth judicial district of the State of Texas, being unable to hold the court by reason of sickness, and an election of a special judge to hold said court for Red River county, Texas, being in order, the clerk of this court prepared a roll of all the practicing lawyers present and who

participated in said election as follows, to wit: N. A. Shaw, A. J. Nichols, R. H. Wells, W. S. Thomas, S. W. Harman, E. S. Chambers, Dave Watson, Geo. F. Burdett, C. D. Lennox, C. A. Worley, W. W. Walker, W. W. Johnson, Geo. F. Conley, V. W. Hale, J. R. Kennedy, R. L. Daniel.

Public proclamation being made at the court-house door by the sheriff of Red River county, Texas, that such election was about to take place, thereupon the said practicing lawyers proceeded to hold such election; the whole number of ballots polled being sixteen (16). V. W. Hale, Esq., having received sixteen ballots, being all the ballots polled, and the said V. W. Hale being present, the oath of office prescribed by law was duly administered to him as special judge of the district court of Red River county, Texas, in words as follows, to wit:

"I, V. W. Hale, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me as special judge of the district court of Red River county, Texas, according to the best of my skill and ability, agreeably to
2 the Constitution and laws of the United States and of this State; and I do further solemnly swear that since the adoption of the constitution of this State, I, being a citizen of this State, have not fought a duel with deadly weapons, nor have I acted as second in carrying a challenge, or aided, advised or assisted any person in thus offending. And I furthermore solemnly swear that I have not directly or indirectly, paid, offered or promised to pay, contributed or promised to contribute, any money or valuable thing, or promised any public office or employment as a reward for the giving or withholding a vote at the election at which I was elected. So help me God."

When he assumed the duties as special judge of this court, when the following proceedings were had, to wit:

In the District Court of Red River County, Texas, May Term, 1896.

THE STATE OF TEXAS, }
Red River County. }

To the Hon. E. D. McClellan, judge of the 6th judicial district of Texas:

The petition of S. E. Watson, who resides in Red River county, Texas, complaining of the Texas and Pacific Railway Company, a private corporation, chartered under the laws of the United States of America, owning, operating and running its trains of cars on its line of railway extending from Texarkana in Bowie county, Texas, to Whitesboro in Grayson county, Texas, traversing the county of Red River, having an office at Clarksville in Red River county, Texas, (C. E. Williams who resides in the city of Clarksville, Texas, being the local agent for said company,) represents and shows to

the court that heretofore, to wit: on the 3rd day of January, 1896, plaintiff was the owner of sixty-four bales of cotton which were stored on and near the O'Neil cotton platform near the depot of the defendant, in the city of Clarksville, in said county of Red River, and was there stored for the purpose of transportation on the defendant's cars, it being then and there a common carrier, receiver of freight, cotton, etc., for transportation and hire, said cotton being of the aggregate value of twenty-six hundred and thirty and 20/00 dollars, all of which will more fully appear by reference to an itemized statement which is hereto attached marked Exhibit A, and made a part hereof, showing the number of bales, class, weights and price of each bale, said cotton was on said 3rd day of January, 1896, reasonably worth the prices shown in said Exhibit "A," here attached as aforesaid and here referred to.

3 Plaintiff further avers that while said cotton was on the said O'Neil cotton platform awaiting transportation as aforesaid, that being one of the places at which defendant received cotton for transportation, the defendant *who* was on the said day, and on its said tract, which passes near where said cotton is stored, running and operating and in a very reckless manner, and apparently in utter disregard to the rights of others, its locomotive, engine, cars, etc., which were propelled by steam at the unlawful rate of speed of about 20 miles per hour as they passed the depot and platform upon which plaintiff's cotton was situated; that the locomotive engine to which defendant's cars were attached on said day was emitting in large quantities sparks, cinders, coals, etc., from its smoke-stack, showing that the spark arresters, if any were used on the engine, were not properly arranged — operated; and that by reason of the negligent running and operating of the locomotive engines, trains, etc., of the defendant on its said road, on the said 3rd day of January, 1896, the aforesaid locomotive engine did, while being operated and run as aforesaid, emit sparks, cinders and coals which alighted on the cotton and platform on which the cotton described in plaintiff's petition was situated and stored, thereby setting fire to said cotton and destroying the same, by reason of which the plaintiff was damaged in the sum of $2630.20, the value of said cotton; that plaintiff had some insurance on said cotton and that after the said cotton had been burned and destroyed by fire as aforesaid, he collected from the insurance company, in which the said cotton was insured, the sum $1077.70, leaving the plaintiff still damaged through negligence of the defendant in the sum of $1552.20, which the defendant refuses to pay though often requested so to do. That said cotton was burned through the negligence of the defendant its agent and employés in running said trains at the time and the manner aforesaid, and for the want of sufficient spark arresters or adjusters and on account of reckless and careless manner in which defendant's trains were being run, said cotton was burned and plaintiff sustained the damages as aforesaid. Wherefore plaintiff sues and prays for citation and on final hearing hereof he have a judgment against the defendant for the value of said cotton de-

stroyed by fire as aforesaid less the amount paid by the insurance companies as aforesaid, for cost of suit and for general relief, etc.

SIMS & CHAMBERS,
Attorneys for Plaintiff.

Filed Apr. 24, 1896:

GEO. MORRISON,
Clerk District Court, Red River County, Texas.

4 *List of 64 Bales Cotton Belonging to S. E. Watson and Burned January 3rd, 1896, by Sparks from Engine of Texas and Pacific Railroad Company.*

EXHIBIT A.

Bales.	Class.	Weight.	Price.	Total.
1	2/14	543	885	$48.05
2	2-5/16	971	912-1/2	88.60
2	3-5/16	1006	850	85.51
9	3-1/4	4557	812-1/2	386.50
16	3-3/16	8405	787-1/2	661.89
4	4-1/4	2056	782-1/2	160.88
13	4-3/16	6843	770	526.98
1	4-5/16	483	805	38.88
6	4-1/8	3159	750	236.92
7	3-1/4	3502	812-1/2	284.53
1	4-3/16	523	770	38.17
1	3-3/16	541	787	42.59
1	3-1/8	396	750	29.70
64 B/C				$2630.20
Less am't paid by insurance Co				1077.70
				$1552.50

The State of Texas to the sheriff or any constable of Red River county, Greeting:

You are hereby commanded to summon the Texas and Pacific Railway Company to be and appear before the honorable district court of Red River county, Texas, at the next regular term thereof, to be holden at the court-house in Clarksville, on the 15th Monday after the 2nd Monday in February, 1896, the same being the 25th day of May, 1896, then and there to answer the plaintiff's petition, filed in a suit in said court on the 23rd day of May, 1896, wherein S. E. Watson is plaintiff and Texas and Pacific Railway Company is defendant, file number of said suit being No. 8000.

The nature of the plaintiff's demand is as follows, to wit: An action for damages in the sum of $1552.50, alleged to have been sustained by plaintiff on Jan. 3rd, 1896, occasioned by defendant's engine setting fire to 64 bales of cotton belonging to plaintiff, worth $2630.20 less $1077.70 paid by insurance company. Said cotton being situated on the O'Neill platform at Clarksville, Texas; and that said fire was caused by negligence on the part of the defendant. Also for costs of suit, etc. And you will deliver to said defendant whose agent at Clarksville, Texas, is C. E. Williams and upon whom service may be had, in person, a true copy of this citation.

5 Herein fail not, but have you before said court, on the first day of the next term thereof, this writ, with your return thereon, showing how you have executed the same.

Attest: GEO. MORRISON,
Clerk of the District Court of Red River County.

Given under my hand and the seal of said court, at office in Clarksville in the county of Red River this 23rd day of April, 1896.

GEO. MORRISON,
[SEAL.] *Clerk District Court, Red River County, Texas.*

Sheriff's Return.

Came to hand the 23rd day of April, 1896, at 6 o'clock p. m., and executed the 23rd day of April, 1896, by delivering to C. E. Williams, agent for The Texas & Pacific Railway Company at Clarksville, Texas, the within-named defendant, in person, a true copy of this citation.

S. T. DINWIDDIE,
Sheriff Red River County, Texas,
By W. J. DINWIDDIE, *Deputy.*

Fees.

Serving 1 copy	$1.50
Mileage	.00
	$1.50

In District Court, Red River County, Texas.

S. E. WATSON
vs. } No. 8000.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Defendant for general answer to plaintiff's petition denies the facts therein alleged show no cause of action.

HEAD, DILLARD & MUSE,
Attorneys for Defendant.

Defendant for general answer to plaintiff's petition denies every allegation therein contained, and demands strict proof thereof.

HEAD, DILLARD & MUSE,
Attorneys for Defendant.

Defendant for special answer to plaintiff's petition says that the injuries complained of, if any such were in fact sustained were proximately caused and contributed to by plaintiff's own
6 negligence and want of ordinary care, in the manner he left the cotton exposed. That said injuries, if any were received, resulted from one of the risks assumed by plaintiff. That of the said defects and causes which produced the injuries complained of, if any were produced, the plaintiff had full notice, or by the exercise of ordinary care on his part, would have had full notice in ample time to have avoided the same.

Therefore, this defendant prays to be discharged with its costs.

HEAD, DILLARD & MUSE,
Attorneys for Defendant.

Filed May 9th, 1896.

GEO. MORRISON,
Clerk of the District Court, Red River County, Texas.

In District Court, Red River County, Texas.

S. E. WATSON
vs.
T. & P. RAILWAY COMPANY. } No. 8000.

With leave of the court first obtained, come S. E. Watson and the Phœnix Insurance Company of Brooklyn, a corporation, the latter appearing hereby and making itself a party plaintiff, and amend the original petition of S. E. Watson, filed herein on August 24, 1896, and in lieu of said original petition and so amending complaint of defendant, The Texas and Pacific Railway Company, a corporation, and respectfully show that plaintiff S. E. Watson is a resident citizen of Red River county, Texas, that plaintiff Phœnix Insurance Company of Brooklyn is a corporation duly and legally incorporated and doing business in the State of Texas, and that defendant The Texas and Pacific Railway Company is a corporation duly and legally incorporated, owning and operating a line of railroad into and through said county of Red River, with a local agent whose name is A. L. Wilkinson, residing in said county and representing it there.

For cause of complaint plaintiff- aver and allege as follows:

That heretofore, on January 3rd, 1896, and for many months prior thereto John W. O'Neill owned, managed and controlled a certain platform and yard in the town of Clarksville, in said county for the storage of cotton in bales, which said platform and yard lay adjacent to the right of way and along a certain side track of
7 defendant, so that the owners of cotton might provide for the safe keeping thereof and for convenience in its transportation,

there being no lines of railroad extending into said town other than that of defendant. That on the date last mentioned and for three or four months prior thereto many bales of cotton were so stored on said platform by various parties under and by virtue of arrangements with said O'Neill, which fact was well known to defendant and agreed to by it and said cotton was at a reasonable safe distance from defendant's tracks.

That among the many bales of cotton so located and stored, were sixty-four bales which were the property of plaintiff S. E. Watson.

That prior to said date, and on or about Nov. 23, 1895, plaintiff insurance company for a valuable consideration made and entered into a contract of insurance with plaintiff S. E. Watson, whereby it did insure him against loss or damage by fire to the amount of fifteen hundred dollars, on said cotton from Nov. 23, 1895, at 12 o'clock noon to January 22, 1896, at 12 o'clock noon, excepting however, such loss as might be caused by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority, and certain other causes which were excepted in said contract, payment to be made after the furnishing of certain proofs of loss thereby provided for, provided that it should not be liable for any amount beyond that stipulated in said contract and provided also in substance that if at the time of the fire the whole amount of insurance of the property covered by said contract should be less that the actual cash market value of such property the insurance company should in case of loss or damage be liable for such proportion only of the whole loss or damage as the amount specified in said contract should bear to the actual cash market value of such property at the time and place of fire.

And it was yet further understood and agreed between plaintiffs that if plaintiff insurance company, in case of fire, should claim that the fire was caused by the act or negligence of any person or corporation, private or municipal, the company should, on payment of the loss, be subrogated to the extent of such payment to all right of recovery of the insured for the loss *of* resulting therefrom, and that such right should be assigned to the company by the insured on receiving payment as aforesaid. That afterwards, on or about Jan. 3, 1896, while said contract was in full force and effect, and while said cotton was covered thereby, said 64 bales of cotton became ignited and burned, and the same was wholly and totally destroyed by fire.

8 That said fire was not due to invasion or any of the other causes which were in said contract excepted, and for which plaintiff insurance company had declined to insure, but was due and directly attributable to the negligence of defendant, its agents and employés in the construction, equipment and operation of a certain train on defendant's line of railroad. That said fire originated from sparks, cinders and fire which were emitted by and escaped from a certain engine and locomotive of defendant while passing by said platform and on defendant's railroad.

That said locomotive was then and there operated by the defendant, its agents and employés in a grossly careless and negligent

manner. That it was run at a high and dangerous rate of speed and volumes of cinders, sparks and fire were permitted and allowed to issue therefrom and defendant wholly failed to exercise ordinary care in the operation thereof, although it knew the location and condition of said cotton. That said locomotive was improperly and negligently constructed, was in bad condition and out of repair and was not supplied with proper, safe or approved appliances to prevent the escape of fire, sparks, etc., although it was propelled by fire and steam and it was defendant's duty to keep the same in good condition and repair and to provide and use the best approved appliances to prevent the escape of fire, sparks, etc.

An itemized statement herewith filed, marked "Exhibit A," and made a part hereof, showing the class, weight and price of each bale of said cotton, the values shown being the reasonable cash market at the time and place of the fire, which statement is true and correct, and the aggregate cash value of said cotton so destroyed at the time and place of its destruction was $2,630.20. That after said fire plaintiff S. E. Watson presented his claim and proper proofs of loss to plaintiff insurance company and asked payment in accordance with said contract of insurance.

That plaintiff insurance company claimed that said loss was due to the acts and negligence of the defendant herein and its negligence as aforesaid. That afterwards, on or about April 8, 1896, plaintiff insurance company paid plaintiff S. E. Watson the sum of $1,077.70 in full settlement of his claim against it, whereupon and in consideration whereof, plaintiff S. E. Watson did, by a proper instrument in writing, assign, set over, transfer and subrogate to plaintiff insurance company all the rights, claims, interest, choses or things in action, to the extent of said sum so paid which he had against defendant by reason of its negligence and the burning and destruction of said property.

9 That by reason of the facts alleged defendants became liable and is liable to plaintiffs for said sum of $2,630.20, together with interest from the date of said fire.

Wherefore, plaintiffs sue and pray that on final hearing they have judgment for their said damages and for the amounts herein shown to be due and owing them respectively by defendant and for such other and further relief whether in law or equity general or special as may be adapted to the nature of their case.

E. S. CHAMBERS,
WM. THOMPSON,
AMOS L. BATEY,
Attorneys for Plaintiff.

Filed May 31, 1897:

GEO. MORRISON, *Clerk.*

In the District Court of Red River County, Texas.

S. E. WATSON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 8000.

Now comes the defendant, leave of the court first had, and files this its first amended original answer, amending its original answer herein filed on the — day of November, 1896, and for such amendment says:

It excepts to plaintiff's petition for that the same is insufficient in law, and of this it prays judgment of the court.

HEAD, DILLARD & MUSE,
Attorneys for Defendant.

For answer the defendant denies all and singular the allegations by plaintiff made and demands strict proof thereof.

HEAD, DILLARD & MUSE,
Attorneys for Defendant.

For further answer this defendant says:

First. That if said cotton was destroyed by fire, which it denies, the same came about through no negligence upon its part. If fire did escape from its engines, said engines were properly equipped with approved appliances for arresting the escape of sparks or fire, were properly manned and operated and were in good condition.

10 Second. If said cotton was destroyed by fire emitted from one of defendant's engines, which it denies, this was through no want of care upon the part of defendant, but came through the want of care upon the part of the owner of the cotton, and the persons and agents who were employed by the owner of the cotton in looking after the same.

The owner of the cotton, his agents and employés, and those to whom he instrusted the cotton were negligent in this: In that they placed said cotton in close proximity to the track where they knew engines to be passing. Although they knew that engines constantly passed and repassed, the cotton was left uncovered and in no way protected from sparks from passing engines, or from fire likely in any way to be communicated to it, nor were proper means for extinguishing fires provided, and large and unnecessary amounts of lint and loose cotton were permitted to gather and remain on the platform close to the defendant's right of way. The owners of said cotton, their agents and employés, assumed the risks of placing said cotton where it was placed, and all danger likely to befall it from fire.

Third. Defendant further says that said platform was operated by J. W. O'Neill, and that said cotton was entrusted by the owner

thereof to said J. W. O'Neill, his agents and employés for handling and storing and in every way managing, and especially was it entrusted to the person or persons controlling, managing and operating a certain platform upon which it was placed, and said cotton was a part of a large body of cotton placed upon this platform, the bales of the same being contiguous to each other and a large portion of the cotton was upon the part of the same that was built upon and extended over the defendant's right of way and the fire that originated in the said cotton and consumed the same did originate upon the portion of the platform built upon said right of way. Said platform was so built upon the said right of way, and was held by said O'Neill and those controlling and operating the same under and by virtue of certain leases which were made to the persons under whom they claimed by defendant, and the rights in which leases have passed to said J. W. O'Neill and the persons in charge of said platform, and under and by virtue of said leases it was by said O'Neill by acceptance of the same especially stipulated and agreed in substance that the leases released defendant from all liability on account of any loss or damage by fire, whether occasioned by sparks from locomotives or otherwise. Said leases were originally executed to persons under whom said O'Neill claimed, but by transfer written or verbal passed to said O'Neill and the parties
11 controlling and operating said platform, were by them accepted, and treated by them as the leases under and by virtue of which they maintained their platform upon defendant's right of way, and as the only authority they had to enter thereon, and said O'Neill and the persons controlling and managing said platform were made by the owners of the cotton the bailees of the same, and were by them permitted to store it upon said platform at such place as they saw fit, and said cotton was so entirely under the control and management of said O'Neill and those having charge of said platform, wherefore the owners of said cotton and all other persons having any rights under him have released defendant from any damage by fire whether the same proceeded from a locomotive or otherwise.

Fourth. If plaintiff had any cause of action against defendant, the same arose in this way. That plaintiff had about 64 bales of cotton on and about the platform, as by him alleged, and the same was all destroyed at one time by the same fire, said fire originating at the same time and place in said cotton and from the same cause, giving him one cause of action, if any, and all of said cotton he had insured under one insurance policy issued by the Phœnix Insurance Company of Brooklyn for the sum of about one thousand seventy-seven and 77 / 100 dollars, and for the destraction of said cotton by fire said insurance company paid him about said sum of one thousand seventy-seven and 77 / 100 dollars, and in consideration thereof he assigned them all or a portion of his cause of action, and they are now the owners of the same, are claiming right to the same, and have instituted in the district court of Red River county — for the same where said suit is now pending, and plaintiff is thus endeavoring

by suit, assignment and otherwise to split up one cause of action, and that for tort, into many parts, which is not allowable.

HEAD, DILLARD & MUSE,
Attorneys for Defendant.

Filed Dec. 8th, 1896.

GEO. MORRISON,
Clerk District Court, Red River County, Texas,
By R. L. HOOKS, *Deputy.*

12 *Petition for Removal of this Cause to the United States Circuit Court for the Eastern District of Texas.*

S. E. WATSON and PHŒNIX INSURANCE CO. OF BROOKLYN, Plaintiffs,
vs.
TEXAS & PACIFIC RAILWAY COMPANY, Defendant.

To the honorable the district court of Red River county, Texas:

Your petitioner The Texas & Pacific Railway Company, respectfully shows that it is the defendant in the above-entitled suit; that the matter in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars. That your petitioner was at the time of the bringing of said suit, since then continuously has been and still is a corporation duly and legally incorporated under the laws of the United States, as is hereinafter more particularly shown; that plaintiff S. E. Watson is and at the time of the filing of this suit, was a citizen of Texas, and plaintiff Phœnix Insurance Company of Brooklyn is incorporated under the laws of the State of New York, then was and still is citizen of the State of New York.

That said suit is of a civil nature, to wit: an action for damages caused by reason of the alleged destruction by burning of cotton.

That said suit is one arising under the Constitution and laws of the United States, in this, to wit: That defendant, your petitioner, is not a banking corporation but is a railway corporation organized under and by virtue of certain acts of the Congress of the United States, to wit: An act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road and for other purposes," approved March the 3rd, 1871, and an act supplementary thereto, approved May 2nd, 1872. That petitioner has a defense to the cause of action herein arising under and by virtue of a law of the United States, to wit: said act of incorporation. That the first amended original petition on which this suit is brought and by which plaintiff insurance company is made a party hereto and by which the amount sued for is first raised to two thousand dollars is filed herein on the — day of May, 1897.

Your petitioner offers herewith a bond with good and sufficient surety for its entering in said circuit court of the United States on

the first day of its next session a copy of the record in this
13 suit and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner prays this honorable court to proceed no further herein, except to make the order for the removal of this cause to said circuit court, and to accept the said surety and bond, and to cause the record herein to be removed unto said circuit court of the United States in and for the eastern district of Texas, and it will ever pray.

HEAD, DILLARD & MUSE,
Attorneys for Petitioner.

STATE OF TEXAS, }
Grayson County. }

I, F. C. Dillard, being duly sworn, do say that I am a member of the firm of Head & Dillard, attorneys for the petitioner in the above-entitled cause, that I read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

F. C. DILLARD.

Sworn to and subscribed by the said F. C. Dillard in my presence, this the 28th day of May, 1897.

O. S. GRESHAM,
[SEAL.] *Notary Public, Grayson County, Texas.*

Filed May 31st, 1897:

GEO. MORRISON,
Clerk District Court, Red River County, Texas.

STATE OF TEXAS, }
Red River County. }

Know all men by these presents, that we, The Texas & Pacific Railway Company, as principal and Edw'd O. Tennison and J. C. O'Conner, are held and firmly bound unto S. E. Watson and Phœnix Insurance Company of Brooklyn, in the penal sum of one thousand dollars, for the payment whereof well and truly to be made unto the said S. E. Watson and Phœnix Insurance Company of Brooklyn, their heirs and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents yet upon these conditions: The said defendant, The Texas & Pacific Railway Company, having petitioned the district court of Red River county, State of Texas, for the removal of a certain cause therein pending wherein S. E. Watson and Phœnix Insurance Company, are plaintiff-, and The Texas & Pacific Railway Company, is defendant, to the circuit court of the United States in and for the eastern district of Texas. Now, if the said, The Texas &
14 Pacific Railway Company, your petitioner, shall enter into the said circuit court of the United States on the first day of

its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue.

Witness our hands this the 27th day of May, A. D. 1897.

THE TEXAS & PACIFIC RAILWAY COMPANY, [L. S.]
By HEAD, DILLARD & MUSE,
Its Attorneys.
EDW'D O. TENISON. [L. S.]
J. E. O'CONNER. [L. S.]

THE STATE OF TEXAS, }
County of Dallas. }

I, H. W. Jones, clerk of the district court in and for Dallas county, do hereby certify that the sureties on the within bond are in my opinion good and ample security for the amount therein specified, and that I would accept and approve same if presented to me.

Given under my hand (and) seal of office at Dallas, this 22 day of May, 1897.

[SEAL.] H. W JONES,
Clerk District Court, Dallas Co.

Filed May 31, 1897.

GEO. MORRISON,
Clerk District Court, Red River County, Texas.

S. E. WATSON ET AL.
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 8000.

MAY 31, 1897.

This cause coming on this day to be heard, upon the petition of the Texas & Pacific Railway Company, to remove same to the circuit court of the United States for the eastern district of Texas, said petition being heard by the court, and it appearing to the court that a good and sufficient bond has been filed, and that said petition shows proper grounds for removal, the prayer of the said The Texas & Pacific Railway Company is granted and its bond approved, and this cause ordered removed to the circuit court of the United States for the eastern district of Texas. And the clerk of this court will make out a transcript of the record of this cause, to be filed in the United States court for the said district of Texas. And in
15 open court, all parties so agreeing, it is ordered that the record be filed in said court setting at Paris.

S. E. WATSON
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 8000.

NOVEMBER 26, 1890.

Ordered that defendant have leave to amend, and jury by defendant.

S. E. WATSON
vs.
THE TEXAS & PACIFIC R'Y CO. } No. 8000.

MAY 31, 1897.

Ordered that plaintiff have leave to file first amended petition.

THE STATE OF TEXAS, }
Red River County. }

I, Geo. Morrison, clerk district court in and for Red River county, Texas, do hereby certify that the foregoing 20 pages contain a true and correct copy of the record in cause No. 8000, wherein S. E. Watson, *et al.*, are plaintiffs, and The Texas & Pacific Railway Company, is defendant, as appears from the original papers and record of said cause now in file in my office.

Given under my hand and the seal of said court at office in Clarksville this the 11th day of June, A. D. 1897.

[SEAL.] GEO. MORRISON,
Clerk District Court, Red River County, Texas.

(Indorsed:) S. E. Watson, *et al.*, *vs.* The Texas & Pacific Railway Co. From the district court of Red River county. Applied for by Head, Dillard & Muse, attorneys for def't, on the 31st day of May, 1897, and delivered to them on the 11th day of June, 1897. Geo. Morrison, clerk, district court Red River county. Wm. Thompson, A. L. Beaty and E. S. Chambers, attorneys for pl'ff. Dallas, Tex.; Sherman, Tex., and Clarksville, Tex., respectively P. O. addresses; Head, Dillard & Muse, attorneys for def't, Sherman, Texas, P. O. address.

(Further indorsed:) Filed in court at Paris, Texas, the 14th day of June, 1897. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

16 In Circuit Court of the United States at Paris.

S. E. WATSON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 84.

Now comes the defendant, and with leave of the court amends its first amended original answer filed 31st day of May, 1897, and says:

First. It demurs generally to plaintiff's petition, because the facts therein alleged show no cause of action.

HEAD & DILLARD,
Attorneys for Def't.

Second. Defendant demurs specially to plaintiff's petition because, first: it is too general, vague and indefinite. Second: it shows that plaintiff Phœnix Ins. Co. claims under attempted assignment by S. E. Watson of a part only of his cause of action against defendant for the destruction by negligence of 64 bales of cotton at the same time and by the same act, which cause of action was indivisible and not subject to assignment in parcels in the manner attempted, and if this suit could be at all cognizable it would only be in equity.

HEAD & DILLARD,
Attorneys for Def't.

Third. Defendant for the general answer to plaintiff's petition denies every allegation therein contained and demands strict proof thereof.

HEAD & DILLARD,
Attorneys for Def't.

Fourth. Defendant for special answer to plaintiff's petition says that the injuries complained of, if any such were in fact sustained, were proximately caused and contributed to by S. E. Watson's own negligence and want of ordinary care. That said injuries, if any were received, resulted from one of the risks assumed by S. E. Watson. That of the said defects and causes which produced the injuries complained of, if any were produced, S. E. Watson had full notice, or by the exercise of ordinary care on their part, would have had full notice in ample time to have avoided the same. That S. E. Watson was specially guilty of negligence in storing and leaving his cotton where it was so close to the track of this defendant as to expose it to fire from the operation of engines run and equipped in the usual way. That a person of ordinary prudence would not have stored and left said cotton where said Watson did. That the cotton referred to in plaintiff's petition was not destroyed or injured by a fire started by
17 this defendant, but said fire was set out and started by some person or cause in no way connected with it, and for which it is in no way responsible. That the locomotives and cars of this defendant were supplied and equipped with the best spark arresters and appliances to prevent the escape of fire, all of which had been carefully inspected and were in the best condition, and said locomotives, cars and appliances were in charge of and operated by the most skilful employés in the most careful manner, so that if said fire was set out by this defendant, it was the result of pure accident, and was in no manner attributable to any fault or negligence on its part. That if said fire was started through the negligence of this defendant, and the cotton described in plaintiff's petition destroyed or injured thereby, it was all done at the same time, and was the result of the same act on its part. Watson's right of action, if any he had, against it therefor was one and indivisible, and he had no right or power to divide it into parcels and transfer or assign different parts thereof to different persons as he has attempted to do, and plaintiffs claiming under such attempted and illegal assignments

have no right to maintain this suit or to subject this defendant to the costs thereof.

That if plaintiff, The Phœnix Insurance Company of Brooklyn ever had any cause of action against this defendant by reason of any of the facts alleged in plaintiff's petition, the same was by agreement entered into on or about the — day of August, 1899, between it and the defendant compromised and the defendant for a valuable consideration was released and discharged from all liability therefor.

That on or about the 13th day of October, 1879, this defendant by its duly authorized agents and officers executed to Walter S. Thompson a lease or contract in writing which was accepted by him, a copy of which in substance is hereto attached marked Exhibit A, and made a part of this answer, and on or about the 18th day of September, 1880, this defendant, by its duly authorized officers and agents and O'Neill and Gaines, entered into a certain lease contract in writing, a copy in substance of which is hereto attached marked Exhibit B, and made a part of this answer. That the John W. O'Neill named in plaintiff's petition became the owner of said lease contracts by successive transfers and contracts and was such owner at the time of the fire in question, and whatever right he had to the possession of said land or to the use and occupancy thereof was derived from said contracts, and was subject to their terms, conditions, limitations and provisions. That the cotton platform named
18 in plaintiff's petition and the cotton of S. E. Watson referred to therein at the time of the fire were situated upon the land described in said lease contracts, and the said cotton was so placed therein by said Watson under an arrangement with said John W. O'Neill and by his permission so that they in like manner became bound by the terms of said lease contracts in the same manner and to the like extent that said O'Neill was himself bound thereby. That one of the provisions and stipulations in each of said contracts or leases was that the second party or lessees did thereby release the party of the first part (this defendant) from all liability on account of any loss or damage by fire, whether occasioned by sparks from locomotives or otherwise, which stipulation has the effect to release defendant from all liability for the damage and loss claimed in plaintiff's petition.

That if defendant is mistaken about all of said platform and cotton being upon the land described in said lease contracts, at the time of the fire, then it says that it was upon land held by said O'Neill under contract or lease from the defendant, which was subject to and contained like stipulations as those set forth above, and it was understood and agreed that the same terms and conditions should apply thereto.

Wherefore, defendant prays to be discharged with its costs and for all other relief it may be entitled to receive.

HEAD & DILLARD,
Attorneys for Defendant.

(Indorsed:) —.

This lease, made the thirteenth day of October, 1879, between the Texas & Pacific Railway Company, lessor, of the first part, and Walter S. Thompson, lessee, of the second part.

Witnesseth: That in consideration of the annual rental of one dollar and the covenants and agreements herein contained on the part of the party of the second part, to be kept and performed, the said party of the first part hereby leases unto the said party of the second part, a portion of its right of way at Clarksville, Texas, Red River county, Texas, as a *sight* for a cotton-seed warehouse and for that purpose only.

The right of way hereby leased is a tract 40 x 12 feet, fronting the south switch or side track and more particularly described as follows, to wit:

Beginning at a point on the west line of O'Neill's and Gaines' platform, ten (10) feet south of the south rail of said side track; thence westerly and parallel with said track forty (40) feet;
19 thence southerly and at right angles to said track twelve (12) feet; thence easterly and parallel to said track forty (40) feet; thence northerly twelve (12) feet to the beginning.

The said party of the second part agrees that within thirty (30) days from the erection of any building or structure on these premises, he will paint the same of a uniform color with the company's depot or other buildings at said station; and furthermore will erect no building, platform or other structure, or pile any lumber on said land nearer than ten feet (10) to the south rail of the side track at said places.

In consideration of the foregoing, the said party of the second part hereby agrees to vacate said land and remove therefrom, within thirty days after receiving written notice from the general superintendent of the Texas & Pacific Railway Company; any building or other structure he may have erected thereon; and does hereby release the said party of the first part from all liability on account of any loss or damage by fire, whether by sparks from locomotives or otherwise.

Signed in duplicate.

GEO. NOBLE,
Gen'l Supt. Texas & Pacific R'y Co.

Witness:
W. H. ABRAMS.

This lease made the eighteenth day of September, 1880, between the Texas & Pacific Railway Company, lessor, of the first part, and Messrs. O'Neill & Gaines, lessees, of the second part.

Witnesseth: That in consideration of the annual rental of one dollar, and the covenants and agreements herein contained on the part of the party of the second part, to be kept and performed, *by* the said party of the first part hereby leases *under* the said party of the second part, a portion of its right of way at Clarksville station, Red River county, Texas, as a *sight* for a cotton platform and for that purpose only.

The right of way hereby leased is a tract 75 feet by — feet

fronting the west end of block No. three (3) and more particularly described as follows, to wit:

Beginning at a point on the east line of Clark street, and ten (10) feet south of the south rail of the switch or side track at said station; thence south to the N. W. corner of said block No. 3; thence along the north line of said block No. 3 seventy-five (75) feet; thence north and parallel to said street to a point ten (10) feet south of the south rail of said switch or side track; thence west and parallel to said track, seventy-five (75) feet to the place of beginning.

The said party of the second part agrees that within thirty
20 (30) days from the erection of any building or structure on these premises, they will paint the same of a uniform color with the company's depot and other buildings at said station; and furthermore will erect no buildings, platform or other structure or pile any lumber on said land nearer than ten feet (10) to the south rail of said side track, at said station.

In consideration of the foregoing, the said party of the second part hereby agrees to vacate said land, and remove therefrom, within thirty days after receiving written notice from the general superintendent of the Texas & Pacific Railway Company, any building or other structure they may have erected thereon; and does hereby release the said party of the first part from all liability on account of any loss or damage by fire, whether occasioned by sparks from locomotives or otherwise.

Signed in duplicate.

GEO. NOBLE,
Gen'l Supt. Texas & Pacific Railway Co.
O'NEILL & GAINES.

Witness:
E. W. BECKWITH.
M. B. CUNNANU.

(Indorsed:) C. L. No. 84. S. E. Watson *vs.* Texas & Pacific R'y Co. Second amended original answer. Filed April 2, 1900. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

In Circuit Court United States at Paris, Tex.

S. E. WATSON ET AL.
vs.
TEXAS & PACIFIC RAILWAY CO. } # 84.

And now comes plaintiff, S. E. Watson, and with leave of the court first had files this his first supplemental petition, and for such, says:

1. He excepts to defendant's first amended original answer, says the same is insufficient in law and of this he prays judgment of the court.

2. He specially excepts to so much of said answer as invokes the alleged contract with O'Neill and release of damages by him, says

the same is insufficient in law because it does not appear therefrom that plaintiff was a party to said alleged contract or had any notice thereof or that the same was in any manner binding on him or that the same contemplated the damages herein claimed, and of this he prays judgment of the court.

21 3. And in case the foregoing exceptions to said answer shall be overruled, this plaintiff denies all and singular the allegations therein contained demands strict proof, and of this he puts himself upon the country.

4. And for special reply to said answer plaintiff says that the alleged release of damages by O'Neill was not intended to apply to any damages except those accruing to the lessees and that if by its terms it could be construed to apply to the damages herein claimed, which is denied, then it fails, through mutual mistake and mistake of the draftsman to express the true intent of the parties.

He further avers that the cotton destroyed was not *not* in existence or in the possession of said O'Neill when said alleged contract was executed; that at the time of storing said cotton plaintiff had no notice of any stipulation of release nor did he ever have any notice thereof until the filing of said answer.

He further avers that said cotton was so stored by the special invitation and with the consent of defendant for the purpose of shipment over its road; that it concealed from plaintiff the stipulation of release which it now invokes, knowing that said cotton was being and would be so stored in ignorance of such stipulation and is therefore estopped from pleading said release as a defense to its own acts of negligence, and of this he prays judgment of the court.

E. S. CHAMBERS,
A. L. BEATY,
Att'ys for Plaintiff.

(Indorsed:) No. 84. S. E. Watson, *et al. vs.* T. & P. R'y Co. First supplemental petition of plaintiff S. E. Watson. E. S. Chambers, A. L. Beaty.

(Further indorsed:) Filed Nov. 22, 1899. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

THURSDAY, *November* 23, 1899.

S. E. WATSON ET AL.
vs.
TEXAS & PACIFIC RAILWAY CO. } C. L. No. 84.

This day this cause came on to be heard upon the general demurrer and the first and second special exceptions of the defendant and the argument of counsel thereon having been heard and the court fully advised in the premises, because it is the opinion of the court that the law is against the defendant, the general demurrer and the special exceptions are overruled; to which ruling of the court the defendant excepted.

22 TUESDAY, *November 20th*, 1900.

S. E. WATSON ET AL.
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } No. C. L. 84.

This cause coming on to be heard, came S. E. Watson, plaintiff, in person, and all parties hereto by the attorneys of record, and announced ready for trial, and thereupon came a jury of twelve good and lawful men, to wit: J. H. Dills and eleven others, who having been duly tried, empaneled and sworn as required by law and having heard the evidence and the argument of counsel and received the charge of the court, retired to consider of their verdict, and on this day brought into open court their verdict in words and figures following, to wit:

"We, the jury, find for the plaintiff, S. E. Watson, against the defendant The Texas and Pacific Railway Company the sum of $1552.50, with interest at the rate of six per cent. per annum from January 3, 1896, to this date, and we find for defendant railway company against the Phœnix Insurance Company of Brooklyn. J. H. Dills, foreman. Nov. 20th, 1900." Premises considered by the court, it is considered by the court that the plaintiff, S. E. Watson, ought to recover of and from the defendant, The Texas and Pacific Railway Company, his damages herein, as found by the jury, in the sum of $1,552.50 principal, and the further sum of $454.87, interest thereon to this date, aggregating the sum of $2,017.37, together with legal interest thereon from this date.

It is, therefore, ordered, adjudged and decreed by the court that the plaintiff, S. E. Watson, do have and recover of and from the defendant, The Texas and Pacific Railway Company, the sum of two thousand and seventeen and 37/100 dollars ($2,017.37), together with six per cent. per annum interest thereon from this date until paid, together with all costs in this behalf expended for which he may have his execution.

It is further ordered, adjudged and decreed by the court that the plaintiff, The Phœnix Insurance Company of Brooklyn, take nothing by this action, but that the defendant shall pay to the officers of court the costs incurred by this plaintiff to which defendant, by its counsel, in open court consents. It is further ordered, adjudged and decreed that the officers of court recover of the parties hereto respectively the costs by them respectively incurred, for which let execution issue.

23 In Circuit Court of the U. S., Eastern Dist. of Texas.

S. E. WATSON
vs.
TEX. & PAC. R'Y CO.

Now comes the defendant and prays the court to grant it a new trial in this cause for the following reasons:

First. The court erred in admitting the evidence of the various

witnesses to the effect that they knew of no other opportunity for the cotton to catch fire than that afforded by the engine, because such evidence was of a negative character and irrelevant in this case, and because it further expressed the conclusion of the witnesses to the effect that the engine might have set out the fire and had such opportunity.

Second. The court erred in admitting evidence as to other fires being set out, the same being irrelevant and immaterial and calculated to prejudice the minds of the jury.

Third. Especially did the court err in admitting the evidence of the witness Cooper as to the fire beside the railway east of Clarksville, because it was not known that such fire originated from the engine in question or any engine, but it was only a presumption that is so originated, and to permit this evidence to be admitted for the purpose of showing that the engine might have set out the fire at Clarksville is to base a presumption, and the evidence was irrelevant and immaterial.

Fourth. For the reasons shown in the last ground of this motion, the court erred in admitting the evidence of the witness Green concerning certain fires that he saw on his way home, and that he did not know to be set out by the engine.

Fifth. For the reasons set out in the last two grounds of this motion, the court erred in admitting the evidence of the witness Rains as to certain fires he saw burning when going from the place of those he saw set out and which fires he did not know to be set out by the engine.

Sixth. The court erred in admitting the evidence of C. M. Wells on cross-examination in answer to the hypothetical question as to the setting out of five fires within a distance of four miles, which answer was to the effect that if witness knew this, he would conclude that the engine was in some way out of fix or improperly equipped because such answer expressed the conclusion of the witness. The question was not such as warranted such conclusion or called for expert evidence and to permit the answer was to substi-
24 tute the conclusion and judgment of the witness for that of the jury and was prejudicial to defendant.

Seventh. The court erred in rejecting the testimony to the effect that the plaintiff made a settlement with the insurance company and agreed to bear one-fourth of the loss and the further proof intended to be offered and showing the settlement of the case as far as the insurance company was concerned, and that such settlement precluded plaintiff from recovering the full amount for which he sued.

Eighth. The court — in his charge to the jury in submitting the issue of the appliances used in arresting sparks being of the most approved pattern, and in telling the jury if they found they were not of the most approved pattern, they could return a verdict for plaintiff because there was no evidence to show that they were not of the most approved pattern, but on the contrary, the undisputed evidence showed that they were of the most approved kind.

Ninth. The court erred in refusing to give defendant's charge on

assumed risk and saying that contributory negligence and assumed risk amount to the same thing.

Tenth. The court erred in overruling general and special demurrers of defendant.

Eleventh. The court erred in retaining this case at all on the common-law docket, but should have placed it on the equity docket, and defendant now prays that the verdict be set aside and the case placed on such docket.

HEAD & DILLARD,
Att'ys for Def't.

(Indorsed:) No. 48. S. E. Watson *vs.* Tex. & Pac. R'y Co. Motion for a new trial. (Further indorsed:) Filed Nov. 22, 1900. C. Dart, c'lk, by H. H. Kirkpatrick, d'y.

TUESDAY, *November* 27, 1900.

S. E. WATSON
vs.
THE TEXAS & PACIFIC R'Y Co. } C. L. No. 84.

This day this cause came on to be heard upon the motion of the defendant for a new trial herein, and the court being fully advised in the premises, because it is the opinion of the court that the law is against the defendant, the motion is overruled; to which ruling of the court the defendant excepted.

25 In the United States Circuit Court for the Eastern District of Texas, Sitting at Paris.

S. E. WATSON
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Now comes defendant, and shows to the court that this term of this court will adjourn in a day or two, and the time will not be allowed to prepare a bill of exceptions in above case.

Wherefore defendant prays that 60 days after the adjournment of this court be allowed it in which to prepare and file a bill of exceptions, and that execution be stayed on the judgment during such time and until the filing of application for writ of error and bond for writ of error herein, should the cause be carried up by writ of error, and that if writ of error bond be filed, that execution be further stayed until the final disposition of the cause.

HEAD & DILLARD,
Attorneys for Defendant, Texas & Pacific Railway Company.

The plaintiff agrees that the court shall allow the 60 days' time for preparing the bill of exceptions herein, and that an order may

be entered staying execution for that length of time without the giving of bond by defendant.

This 26th day of November, 1900.

A. L. BEATY,
Attorney for Plaintiff.

Granted:
D. E. BRYANT, *Judge.*

(Indorsed:) C. L. No. 84. S. E. Watson *vs.* Tex. & Pac. R'y Co. Motion for 60 days to file bill of exceptions. Filed Nov. 27th, 1900. C. Dart, clerk, by H. H. Kirkpatrick, d'p'ty.

TUESDAY, *November* 27, 1900.

S. E. WATSON
vs.
THE TEXAS & PACIFIC RAILWAY CO. } C. L. 84.

On this day came on to be heard the motion of the defendant for sixty days after the adjournment of this court within which to prepare a bill of exceptions, and that execution be stayed pending that time; also there is filed therewith the agreement of
26 counsel for plaintiff that execution may be so stayed without the giving of security. It is therefore ordered, adjudged and decreed by the court that said motion be granted and that sixty days after the adjournment of this term of this court be given the defendant within which to prepare and file a bill of exceptions herein and that execution be stayed pending said time without the giving of any security by the defendant, and it is further adjudged that if within said time a writ of error should be sued out and an approved bond be filed, that execution shall be further stayed pending the hearing of said writ of error.

(Signed) D. E. BRYANT, *Judge.*

Bill of Exceptions.

In the United States Circuit Court for the Eastern District of Texas.

S. E. WATSON
vs.
TEXAS AND PACIFIC RAILWAY COMPANY.

Be it remembered that on the trial of this cause the following was all the evidence introduced together with exceptions taken as to the admission and exclusion of evidence, to wit:

It was agreed that on the 3rd day of January, 1896, S. E. Watson was the owner of 64 bales of cotton on the platform at Clarksville, Texas, known as the O'Neal platform. This cotton was of the value of $2,630.20, and on that day was destroyed by fire. Watson had an insurance policy on the cotton in the Phœnix Insurance Co. of Brooklyn, insuring him against loss and damage by fire, which

policy was in full force on the date named. This policy among other things, provided that in case the cotton was destroyed or injured by fire, and the insurance company should claim that the fire was caused by the act or negligence of any person or corporation, private or municipal, the company should on payment of the loss be subrogated to the extent of such payment to all right of recovery of the insured for the loss resulting therefrom, and that such right should be assigned to the company by the insured on receiving payment as aforesaid. Watson made proofs of loss as provided in the policy of insurance and the company under these proofs paid him $1077.70, whereupon he assigned to the insurance company his cause of action on account of the destruction of the cotton to the amount of $1077.70. The suit before removal was pending
27 in behalf of both Watson and the insurance company against defendant for the sum of $2630.20 and interest from the date of the fire. After the removal of the case to the Federal court, the defendant made a settlement with the insurance company for its part of the cause of action, and it was agreed that at the time of the trial the railway company had a perfect defense as to the insurance company, and that if Watson was entitled to recover at all in the suit, he was entitled to recover the sum of $1552.50 with interest at six per cent. per annum from January 3rd, 1896. It was proven that there was a cotton platform at Clarksville, Texas, near the tracks of the defendant railway. The railway here runs east and west, and this platform was situated south of the railway immediately north of the platform and within five to eight feet of it was a track called the oil-mill track. Next north of this was a switch-track called the house track and then further north was the main track, and yet further north was another switch or side track. The house track was at a distance of between thirty and forty feet from the platform and the north line of the cotton so placed as to be between 35 and 40 feet from the south line of the house track, and something over 50 feet from the center line of the main track. On the 3rd day of January, 1896, defendant had a freight train going east. This was train No. 40, engine 182. On this train B. F. Caperton was conductor, Ed. Van Housen was engineer, and J. W. Chisholm was fireman. About the time the train was passing the compress about the middle of the afternoon the cotton took fire. The freight train was the only one that passed by the compress within an hour prior to the time of the fire.

Lon Martin testified for the plaintiff, that when the fire originated he was about 200 feet east of the platform. The fire when he first saw it was about a yard square. It spread fast towards the south. It originated on the north edge of the platform. The cotton was all over the platform except a few feet along the north edge. The freight train was just behind him when he first noticed the fire. It was only about 400 yards from the engine to the fire when he first noticed the fire. The train had stopped at Clarksville. It seemed to be operated like any other train. It was started at tolerably good speed, but not at full speed. Witness did not notice how

much it was puffing and did not notice any fire or sparks escaping. Witness said "I do not know of any opportunity for the cotton to have caught fire except from the locomotive."

28 HAYS LANE testified for plaintiff: I was about 200 feet from the fire when it first broke out and immediately went to it. It was not on more than one bale of cotton when it originated. This bale was at the northwest corner of the platform. The fire spread very rapidly. I have no knowledge of the origin of the fire; did not see it originate. The train stopped at Clarksville. I saw it pull out. Don't remember how it was operated or what its speed was, or whether it was puffing much or little. Don't remember whether I saw any sparks or not.

JAMES AYDELOTE testified for plaintiff: On January 3, 1896, I was working for the oil mill at Clarksville, Texas. I saw the fire on the compress platform. Was about 360 feet from it when I first saw it. When I noticed it, it was just blazing up; looked like it had just started. It was on the north side of the platform on the edge next to the railroad. The fire burned the platform and about 1200 bales of cotton. I do not know how the fire originated. There was a freight train in sight when I first saw the fire. The back end of it was about 360 feet east of the fire. When I first saw the fire the flames were about five or six feet high. When I saw the train it was moving east and going slow. It was puffing about like an ordinary engine does when starting a freight train. I did not see fire or sparks come from the locomotive, but I saw them after they had fallen. I know of no opportunities for the cotton to have caught fire except from said locomotive pulling said train east on defendant's track. I know of another fire about 60 feet south on the south side of the main track. It occurred in a pile of shavings on the same day. There were cinders over the work-bench and on the ground where this fire was. This was about 350 feet east of the cotton fire. I saw this and the cotton fire about the same time. Don't know which started first. This fire in the shavings was very small and was soon stamped out. There was a train in sight when both fires originated, the same train I referred to above. When this evidence was offered as to the other fire defendant then and there objected because the same was irrelevant to any issue in the case, and could not throw light upon it, but to admit the evidence of this fire to prove the origin of the fire to the cotton was to found a presumption on a presumption. These objections were overruled, and to this action of the court the defendant then and there in open court excepted.

29 LEE COOPER, testified for plaintiff: On the afternoon of Jan'y 3, 1896, I was on the public road driving from the east towards Clarksville. Before I got to Clarksville I saw the smoke from a fire on the cotton platform, and when I got to the platform it was about half covered with flames, the north half being covered. When I was about one and one-fourth miles east of Clarksville, the freight train passed me about the time I crossed the railroad. I

drove on about 100 yards towards Clarksville after I saw the train when I saw the smoke from the fire of the platform. When I saw the train it was running at an ordnary speed and seemed to be operated as trains ordinarily are. I saw no sparks or fire, but I noticed the smoke escaping from the engine. It was unusually thick.

The witness then further testified: When I was about a quarter of a mile west of where I saw the train I saw grass burning on the south side and near the railroad track. I was riding in a trot from the time I saw the train until I came to this fire. I don't know how this fire originated. I did not see it started. This fire and the platform were burning at the same time.

When this evidence was offered as to the witness seeing the grass burning about a fourth of a mile after passing the train, it was objected to by defendant because it was not known how this fire originated, and to admit the evidence was to presume that the fire originated from the engine, and on this presumption found the further presumption that the cotton fire originated from sparks set out by the engine, and the evidence was irrelevant. The court overruled these objections and admitted the evidence, to which action of the court defendant then and there in open court excepted. The court in admitting the evidence said to the jury: "In this suit the "question of negligence or no negligence, and whether or not there "was a proper spark-arrester is a question to be considered by the "jury, and in connection with that the main question in the case, I "think this evidence is admissible as a circumstance."

SAM TAYLOR testified for plaintiff: I was about 150 yards from the platform when the fire broke out. When I first saw it, it seemed to be about the size of a hat and was on a bale of cotton on the north edge of the platform. It spread very rapidly. The cotton was piled in double rows all over the platform, except the strip which is left bare on the north side. There was a freight train pulling out when I first saw the fire. The train went out on the main track of the Texas & Pacific. It was not on the track nearest the cotton, but was on the main track. The engine was about 135 yards from the fire when I saw the fire. The train was going east. It had stopped at Clarksville on this occasion and done some switching. It made its start to leave about 100 yards west of the depot, which is about 100 yards west of the cotton platform. When the train passed the platform it was going at a pretty good speed, but nothing like full speed. It seemed to be operated just like any other train. It was puffing very hard. When the train was passing the platform I could see live sparks escaping from the engine and they were pretty thick. The cinders were pretty thick around there where I was standing. The wind was blowing hard from the north. I was on the south side of the track. I could not see any other opportunity for the cotton to have caught except from this engine, and I could see the platform and cotton plainly. I am a colored man.

FRANK MOORE, testified that at the time the fire originated on the cotton platform which is known as the O'Neal platform, I was standing at the Texas & Pacific passenger depot, which is about 150 yards west from the place where the fire started. What first attracted my attention was a blaze proceeding from some cotton on fire. When I first noticed it, it looked like there were two or three bales on fire. There was an engine and locomotive within about 75 yards from the cotton. A few minutes before the fire started the train backed down a short piece to get a start. At the time I saw the fire the train was running by the platform upon which the cotton was located, and the engine was about 75 yards from the fire, and the rear end of the train was from 60 to 75 yards from the fire. Said fire was between the engine and the rear end of the train upon said platform and about 20 feet to the south of said train. The train was a freight train and 140 to 150 yards long. The train was running at a slow rate of speed, six or eight miles an hour. It was puffing pretty hard.

J. E. SRYGLEY testified for plaintiff: On the date of the platform cotton fire I was in Clarksville and somewhere between the depot and town when the fire started. I had crossed the railway. As I crossed the railway I saw a locomotive just west of the depot drawing a train. The train was then about 200 yards west of the cotton and was going east. When I last saw the train after I crossed
31 the track it was passing by the cotton platform. Did not notice particularly what kind of train it was, but think it was a freight. When I first saw the train it was starting from a point west of the depot, and after I had got some distance past the track I looked and it was opposite the cotton. I had gone but a short distance further when I heard the fire-alarm. The train puffed right along opposite the cotton. There was a dense smoke escaping from the engine and it blew towards the cotton. I cannot say that I saw the fire escaping from the engine, but the smoke escaping by the side of the cotton attracted my attention.

ANDREW DEAVER testified for plaintiff: I was about thirty yards from the platform fire when it first broke out. It was just beginning to blaze when I first saw it. It was spreading pretty fast and soon covered the whole platform. The wind was blowing hard from a northerly direction. I did not see the fire originate. I saw the smoke and saw cinders from the engine flying in the air and saw them falling, but I did not see them when they struck the cotton. There was a train in sight when I first saw the fire. The engine was then past the place where the fire started and the train was passing. This was a Texas & Pacific Railway train. It was not on the track nearest the cotton, but was on the main track. The engine at this time was about 75 yards from the fire. When I first saw the fire it seemed to be on about two bales of cotton. The train was going at a pretty good rate of speed for a train just pulling out. It seemed to be operated like other trains. It was puffing considerably. I saw considerable fire and cinders escaping from the engine as it passed.

As the cinders fell I could see them smoke. I could see no opportunities for said cotton to have caught on fire except from said locomotive. When I first saw the train it was just starting from the depot at Clarksville, and was going at a pretty good rate of speed for a train just starting. It seemed to be operated like other trains. I am a colored man.

When the evidence above shown of the witnesses Lon Martin, James Aydelote, Sam Taylor and Andrew Deaver was offered to the effect that they did not know of any other opportunity or see any opportunity for the cotton to have caught fire except from the locomotive drawing the train referred to, and at the time said evidence was offered from each witness defendant then and there objected because the evidence was of a negative character and would
32 not be relevant, further it was in the nature of a conclusion by the witness to the effect that the fire did originate from the engine. These objections were overruled and the evidence admitted, to which action of the court the defendant then and there in open court excepted.

H. A. GREEN testified for plaintiff: On the 3rd of Jan., 1896, I was working on John Ward's place about three miles west of Clarksville. I saw the smoke of the burning cotton and platform. I was hauling wood. About a half hour prior to the time of the fire and before I saw the smoke a freight train on defendant's road passed me going east. When I saw this train it was running at ordinary speed. There were fire and sparks escaping from the locomotive. The cinders fell around me and on me, and set the grass on fire about 25 or 30 yards from me. This was about three and one-half miles west of Clarksville, and about thirty feet from the railroad track and on the south side. It originated from the train which passed me as before mentioned.

When this evidence was offered it was objected to by defendant as irrelevant and immaterial, which objection was overruled and the evidence admitted, to which action of the court defendant then and there in open court excepted.

The witness then proceeded to say: In addition to the fire I have been testifying about I saw two other fires. After leaving this fire I went down the railway track towards home and the grass was on fire in two other places that I saw. These fires were about the same distance from the track as the other fire I saw. These fires were not extensive. They burned off small patches of grass from one-eighth to one-half acre. I did not see any of these fires start except the first one mentioned, and know of no other way the last two could have originated except from the train. They were all on the same afternoon as the cotton fire, and immediately after the train passed.

When the evidence was offered as to these two fires, it was objected to as irrelevant and immaterial, and further that it was not shown that these two fires originated from the train, and there was only a presumption of such origin, and to permit testimony to be given as to these in order to show that the cotton fire probably originated

from the engine or negligence upon the part of the railway company was to found a presumption upon a presumption. The objection was overruled, and the evidence admitted, to which action of the court defendant then and there in open court excepted.

33 L. A. RAINS testified for plaintiff: I was hauling wood on the day of the compress fire about three miles west of Clarksville. I was not present at the fire, but could see the smoke. A short while before the fire a freight train passed me on the T. & P. road going east. This was three or three and one-half miles west of the fire. The train was being run at an ordinary rate of speed, and seemed to be operated as freight train- usually are. I could not see any fire escaping from the locomotive, but cinders were escaping from it very freely. Yes; I saw a fire about three and a half miles west of Clarksville, before the cotton fire about a half or three-quarters of an hour. I was about 75 or 100 yards from the fire when it started. The engine was about 200 or 300 yards past the fire when I saw it. This fire was about 40 or 50 feet south of the track, and burned off about a half acre of grass. This fire originated from the freight train before mentioned.

When this evidence was offered it was objected to by defendant because irrelevant and immaterial, which objection was overruled and the evidence admitted, to which action of the court defendant then and there in open court excepted.

The witness further testified: The grass was also set on fire about the same time about 150 yards west of my house, and about 40 feet from the track. It only burned off a small part of the Bermuda grass, and about 300 yards east of my house the grass was set on fire about the same time, but was quickly put out. This was about 60 feet from the track.

When the evidence as to these last two named fires *were* offered it was objected to because irrelevant and immaterial, because it was not shown that they originated from the engine, but there was only a presumption that they may have so originated, and to admit them in evidence for the purpose of showing that the cotton fire originated from the engine, and negligence upon the part of defendant was to found a presumption upon a presumption, which objections were overruled and the evidence admitted, to which action of the court defendant then and there in open court excepted.

Plaintiff here closed.

34 Defendant then proved that the greater part of the platform where the fire originated, and which was occupied by J. W. O'Neal was situated on the right of way of defendant. That the cotton was placed on the platform in contiguous rows; that the fire originated on a part of the platform which was situated on the right of way, and the bulk of the cotton was on the part of the platform on the right of way. That the fire spread from this place over the whole platform. In connection with this evidence, defendant further proved that the platform was located and kept on defendant's right of way under certain leases executed by it to persons who

had assigned the leases to J. W. O'Neal, and that J. W. O'Neal by assignment at the time of the fire held and maintained the platform on the right of way under these leases. Defendant then offered in evidence the leases which showed that in consideration of an annual rental of one dollar and the covenants and agreements to be kept and performed by the lessee, the lessor, The Texas and Pacific Railway Company made lease of so much of its right of way as was covered by the platform for the purpose of permitting such lessee and the assigns to operate a cotton platform thereon, and it was further covenanted and agreed in such lease, that "such lessee does hereby release the Texas & Pacific Railway Company from all liability on account of any loss or damage by fire whether occasioned by sparks from locomotives or otherwise." It was offered to be proved that said O'Neal held the right of way as aforesaid subject to the terms and stipulations of this lease. When this evidence was offered it was stated by defendant in answer to a question of the court, that defendant would be unable to prove that Mr. Watson knew of the terms of the lease, but that, on the contrary, the evidence would show that he did not know of its terms, but defendant further stated, that it would be able to show that Mr. Watson had stored the cotton there under the control of O'Neal leaving it there under such control until such time as it might be sold or shipped. When this statement was made plaintiff objected to the introduction of the leases, because, first, the leases did not purport to release the railroad company from any damage except such as the les-ees might sustain, it not being contemplated to release the railroad from damages to other parties; second, it would be a contract against public policy and void in so far as the railroad company undertakes to contract against its own negligence; third, it does not appear that the plaintiff in the case had any notice of the terms of the lease, and this particular stipulation releasing the railroad company from liability, and in the absence of proof that
35 plaintiff had notice, this would not be binding on him, he not being a party to the lease; fourth, the evidence was irrelevant, immaterial and incompetent. These objections were sustained and the lease excluded. To this action of the court defendant then and there in open court excepted.

It was proven in behalf of defendant that engine 182 which passed the platform about the time of the fire was what is known as a straight stack extension front end spark-arrester.

A. A. CAMPBELL testified for defendant by deposition: I heard of the fire which occurred about Jan'y 3, 1896, on the cotton platform at Clarksville, Texas. On Jan'y 4, after this fire I made an examination of engine 182 at the instance of Mr. Wm. Laing, foreman of the round-house of defendant at Texarkana. I have had 18 years' experience in running a locomotive, and was master mechanic for the Kansas City, Pittsburg & Gulf R'y Co. and the T. & S. F. Railroad Co. for three years, and as such supervised the building, overhauling and repairing of locomotives. I am consequently very familiar with the construction of the same, and also with the appli-

ances used in railway locomotives for the purpose of arresting sparks. When I examined T. & P. engine 182, I found them in first-class condition. It had what is called the extension front end, and straight smokestack and front end with netting and diaphra-m sheet all in good order. I made an examination of the spark-arrester which is in the front end, not in the smokestack, and found same in good condition. The ash-pan was likewise in good condition. Engines with appliances for the arresting of sparks such as this are in common use on railways, and are approved for arresting sparks. They are used on 75 per cent. of the railways, and are considered the best by people familiar with the operation of railways for the purpose of arresting sparks. The engine had no netting in the smokestack. The netting is not used in the smokestack of such engines, but in the front end. The netting was in good condition. It was of a grade and character most generally used in front ends for arresting sparks, and is considered the best for this purpose by people familiar with the operation of railways. In examining the engine, I found no indication of recent repairs having been made on ash-pan, smokestack or spark-arrester. From my experience with railroad locomotives, and my knowledge of appliances used for the purpose of arresting sparks and from the condition in which I found
36 said engine 182 at the time I examined it, I considered said engine safe for the purpose of arresting sparks. I examined the engine at the instance of Wm. Laing, who told me that it was claimed by some people in Clarksville that the engine had set fire to cotton at that place. If any repairs had recently been made on the engine I would have noticed it.

C. H. TRAVER testified for defendant: That he was 56 years old and resided at Bird's Point, Mo., and was general foreman of the car department of the St. L., S. W. R'y at Bird's Point. On the 4th of Jan'y, 1896, he held the same position at Texarkana. On that date, at the instance of Mr. Laing, he made an examination of engine 182 as to the condition of its appliances for arresting sparks. His testimony as to this condition was practically the same as the testimony of A. A. Campbell. He found all the appliances in first-class condition, and no indication of recent repairs. The appliances were the best approved among persons familiar with the subject.

ED. VAN HOUSEN testified for defendant, by deposition taken on the 3 day of November, 1899. He said: My name is Ed. Van Housen, am 47 years of age and am a locomotive engineer, and was such on the 3rd and 4th day of Jan., 1896. I heard of the fire mentioned in Clarksville. I was there that day operating engine 182, pulling train 40. I arrived at Clarksville about 3.45 p. m., remained about 35 minutes, leaving at 4.20 p. m. I was engaged in switching while there. I passed the cotton platform on the main line and also on the house track several times. I passed within 30 or 40 feet of the cotton platform as near as I can judge, at no time faster than 5 miles an hour. The only tracks I used while in Clarksville were the main track and the house track. I made an examination

of the engine on the 4th of Jan'y in the round-house at Texarkana. I am positive that the engine had not been repaired, because the netting could not be reached without opening the front door of the extension front, and the condition of the nuts showed that it had not been opened since it was last painted. No repairs had been made on the ash-pan or smokestack since I left it. I could not see no change in the engine since I left it. I did work steam when passing and repassing the cotton platform. I had to use steam to handle the cars, but did not pull them at any
37 time faster than five miles an hour. I am always careful in running an engine in the vicinity of cotton, and I took the same precautions that I usually do in such cases. I took the precaution to see that the hopper was never opened nor the ash-pan cleaned while we were at Clarksville. The fire-box door was not opened while we were passing the cotton. I had been running the engine three or four months regularly, and have never seen her throwing fire or sparks when the fire-box door was shut. I took charge of the engine at Bonham on that day and had run her from Bonham to Clarksville, 67 miles. I ascended three of the hardest grades on that division and did not see any sparks or fire, nor did I see her throwing any while at Clarksville. I ran the engine to Texarkana and left her there. The ash-pan and spark-arrester were in perfect condition when I left her. I saw the engine the next day in the afternoon and its condition was the same. It was an extension front end engine, and had the same kind of spark-arrester in general use. When the front end was opened the next day at Texarkana the spark-arrester was found to be in perfect condition. The netting was the same kind what was in use on all engines of the T. & P. road and was considered the best.

In answer to cross-interrogatories offered by plaintiff, the witness said: I do not believe it is a fact that the engine set fire to the cotton. The precautions I took to prevent the escape of fire was to see that the engine was in perfect condition, and did not allow the fire-door to be opened while passing or repassing before the cotton.

J. W. CHISHOLM testified for defendant: That he was fireman on engine 182, train No. 40, which passed Clarksville going east on the afternoon of the 3rd of Jan'y, 1896. We did some switching at Clarksville, but used no more steam than was absolutely necessary in handling the engine. The engine never came nearer to the cotton platform than the main track. In handling the engine in switching and in passing the platform, we were very careful after finishing our work we pulled out from Clarksville and went into Texarkana. The next day after hearing of the fire and hearing it said that it was claimed at Clarksville that our engine set fire to the cotton on the platform, I examined the netting and ash-pan and appliances for preventing the escape of fire, and found them all in good condition. The door of the fire-box was never opened while we were near the cotton at Clarksville. We commenced the run at Bonham, and I was fireman on the engine from that place. I did not notice it throwing sparks.

38 O. M. SEEGAR testified for defendant as follows: I am at present, and on Jan'y 3rd and 4th, 1896, was a merchant. I was formerly a railway engineer and ran an engine for 16 years and am familiar with engines and the handling of them. On Jan'y 4th, 1896, at the request of Mr. W. W. Laing, foreman of the round-house at Texarkana, I examined engine 182 of the T. & P. road, with regard to the condition of the appliances for preventing the emission of sparks, and with regard to the ash-pan. This engine was what is known as an extension-front engine, and is one of the most approved patterns for the prevention of the escape of sparks and in general use as such on all the leading railroads. I found all the appliances for preventing the escape of sparks in perfect condition. The netting was as small as can be successfully used for this purpose and in good condition. It was bolted in, and showed that it had been used and there was no evidence of any recent repairs about the appliances for the prevention of the escape of sparks, or about the ash-pan or evidence of other recent repairs about the engine. The ash-pan netting and all appliances were in first-class condition.

W. W. LAING testified for defendant as follows: I was general foreman of the T. & P. road on the 4th day of Jan'y, 1896, at Texarkana, and had charge of the shops there and of engines coming into and going out of Texarkana. On the 4th day of Jan'y, 1896, I heard that it was claimed at Clarksville that engine 182 on train 40 which passed through Clarksville in the afternoon of the 3rd had set fire to cotton on the platform there. I made an examination of the ash-pan, netting and appliances for the prevention of the escape of sparks and found them all in good condition and repair. At my request, Mr. O. Seegar, Mr. A. A. Campbell, Mr. Peter Gable, Mr. C. H. Traver, Mr. W. H. McCartney, who is now dead, and Mr. Thomas Heston made an examination of engine 182 with regard to its ash-pan, and appliances for preventing the escape of fire. This examination was made on the afternoon of the 4th of Jan'y, 1896. There had been no changes made in the engine or the appliances for preventing the escape of sparks or repairs on it or them between the time of the fire and the time of examination. On the 20th of Dec., 1895, prior to the time of the fire the netting, ash-pan and all appliances for preventing the escape of sparks were thoroughly examined, and were then in good and proper condition for the purposes for which they were used, and they were in like condition on
39 the 4th day of Jan'y, when examined by me and the gentlemen above named. I have known Ed. Van Housen for a long time and likewise J. W. Chisholm. The former is an experienced and competent engineer, and the latter an experienced and competent fireman.

C. M. WELLS testified for defendant: I am foreman of the boiler department at the main shops of the Texas & Pacific R'y Co. at Marshall. I have to do with the building of boilers and with the appliances pertaining to the arresting of sparks used on the locomotives of the Texas & Pacific railway. I am in control of the part of the shops which has to do with spark-arresters. When an engine

is rebuilt, it is usually built at Marshall, but repairs are made at divisional points, as Texarkana, Ft. Worth and Big Springs. I have been engaged in railroad work for thirty years working for the Pennsylvania Central, Gulf Colorado & Santa Fe, Mexican Central, Central Pacific, and Texas & Pacific. I have a wide acquaintance with spark-arresters and the various patterns used. There is none to my knowledge that has yet been invented that will entirely prevent the escape of sparks. The extension front end and straight stack, such as is used on the Texas & Pacific, is the kind used on ⅞ of the railways in the Union, and is the most nearly a complete spark-arrester of any that has been invented. A perfect spark-arrester cannot be made and allow locomotives to generate sufficient steam to move a reasonable train over a railway. The meshes used in the engines have three openings one way and four the other, or twelve openings to the square inch. If the openings were made smaller than this, the operation of the engine would not be practicable. The witness further testified at length explaining the construction and operation of this system of arresting sparks.

In answer to cross-examination, the witness said: I do not know anything as to the condition of engine 182 on Jan'y 3, 1896. Yes, there are some other things that to some extent would have to do with the throwing of sparks other than the appliances. If the fire was low and the throttle opened pretty wide, it would start light particles through the front end. The fire being well burned down and no fresh coal in the fire-box when the door was opened and the engine working hard, small particles could be picked up and carried through the meshes. The sparks can escape nowhere else than through the smokestack, but some particles of fire can fall through the ash-pan. This is at the bottom of the fire-box, and is a sheet-iron pan fastened close to the fire-box with dampers on each end, and with netting on each side. If the ash-pan was allowed to get full of ashes some might fall out through the front. In the front part of the engine is the reservoir for holding sparks. There is what is called a deflecting plate on which the sparks are broken up. Those small enough to go through the meshes are then carried out by the draft through the smokestack. Those which are larger go into this reservoir. If this reservoir were allowed to get too full, more sparks would be thrown out than otherwise. The reservoir ought to be cleaned out once in every fifty miles. It depends on the kind of train. A passenger train would not be required to be emptied more than once every hundred miles, but a freight train once every fifty miles. Where the grades are heavier you would have to clean them out oftener than where the grades were light. The distance from Bonham to Clarksville is 67 miles. The average for cleaning the reservoirs is fifty miles. Don't think they would have to be cleaned oftener than this.

Here the witness was asked by plaintiff's counsel the following questions: "Suppose an engine should come along, and in the course of four miles and a quarter should set out say eight fires, should set fire to the grass in some of these places, set fire to shavings sixty

feet from the right of way, set cotton on fire, and that live cinders could be seen falling and did fall and smoked after falling on the ground over work-benches and things and over platforms, would you say there was anything wrong about the operation or construction of that engine, or would you say it was all right; and suppose, instead of being eight fires there were five under the conditions named to you, what would you say?" To this question and the evidence sought to be elicited, defendant objected for the following reasons: The evidence sought to be elicited was not such as was the subject of expert testimony, but the endeavor was to substitute a conclusion of the witness for that of the jury, and it was not allowable by a hypothetical question such as this; and the answer thereto to prove the bad equipment of the engine in the face of the actual testimony that the equipment was all in good order. These objections were overruled, and the witness was permitted to testify as follows: "An engine that will do as you have stated is doing something unusual, very unusual. If there was dry and combustible material close to the track, a spark from the ash-pan might
41 drop among it and set fire. What you said might have occurred, but it would be very unusual. I could not say that there would be anything wrong in the operation of the engine, but there might have been something deranged about the ash-pan, is the only way I could account for it. If the engine did set out sparks in the manner stated by you, I cannot believe that the engine was in quite perfect condition." To the action of the court in overruling the objection and admitting the evidence, the defendant then and there in open court excepted.

On redirect examination the witness said: A fire can originate from an engine even when it is properly equipped. If I were told that five fires or eight fires were set out from an engine running a short distance over a track at a distance of a few feet from the track, I would believe that the engine had something out of condition, but if an actual examination of the engine showed its condition to have been good and proper where the fires were set out, in the face of that evidence I would not believe that the engine was in bad condition, because this would be positive proof. The velocity of the wind and the condition of the atmosphere govern the distance that a fire would be set out from the track. Engines in perfect condition very often set out fires. The condition of the atmosphere and the direction of the wind has something to do with the setting out of fires. A heavy atmosphere will keep the sparks down close to the train. A high wind and light atmosphere will blow the sparks and carry them quite a distance. When fire escapes from the ash-pan it drops down on the track. If a hard wind were blowing, and the train was on a fill, it might blow to the base of the fill.

S. E. WATSON being called by defendant, testified: Yes, I placed my cotton on the O'Neal platform at Clarksville. I put it there to have it on hand and sell it. I expected to sell it at Clarksville. Sometimes I sell it there and sometimes I ship it. I don't know just how long it had been accumulating there; some of it for some

time, and some of it probably a few days. Buyers had been sampling cotton about the platform. In sampling they pull the cotton out. A great deal of the cotton had been opened and sampled on the platform during the fall. Tarpaulins and tarred sheets of ducking that are used among other things to put over the cotton to protect it from the weather and from fire from passing engines. Think there were other cotton yards at Clarksville at this time, but
42 I do not remember particularly. I was putting the cotton on the platform for my own convenience. I knew that engines had to pass and repass frequently. The cotton was placed there with Mr. Oneal, and if I shipped the cotton out I paid so much for storage, but if I sold it at Clarksville, I did not pay any storage. The purchasers paid it in this event. I do not recollect whether the cotton on the platform was absolutely uncovered or not. Don't recollect whether there were tarpaulins used here at the time or not. My recollection is that a part of it up near the track was covered, but that a part back from the track was uncovered. Do not remember how I testified on the former trial about this.

Defendant offered in evidence the deposition of Ed. Van Housen, taken on the 1st of June, 1900. He said: I am the same Van Housen whose deposition was taken in the Watson case. The cinders were cleaned out of the head end of engine 182 on January 3, 1896, at Paris, Texas, before reaching Clarksville. I distinctly remember that on this particular occasion. I took the engine over on what is known as the coal track, to the coal bin, for the purpose of recoaling the engine, and while it was being recoaled the cinders were cleaned out. Another thing that impressed it on my memory was I heard of the fire at Texarkana the next day after the fire—and I naturally began thinking when the cinders were last cleaned out before reaching there.

On cross-examination the witness said: I told Mr. Dillard of the firm of Head, Dillard & Muse, about a month ago about cleaning the cinders out. I first told the foreman at Texarkana the next day after the fire about cleaning the engine out at Paris.

It was proven that Paris is 31 miles from Clarksville.

Defendant here closed.

Plaintiff offered in evidence certain parts of the deposition of B. F. Caperton, taken by defendant in November, 1899. When the evidence was offered the defendant objected, because the witness was in the court-room, and it was not allowable to read his evidence. It was stated by defendant's counsel that at the time the deposition was taken, an agreement was made that the depositions might be taken according to the laws of the State of Texas, and it was further agreed that the fact that the witness might live within
43 100 miles of the court should not preclude his depositions from being taken; and it was further stated that this witness lived in Miller county, Arkansas. The objection was placed solely on the ground that inasmuch as the witness was in the court and tendered to plaintiffs by defendant, he must be placed upon the

stand, and that his deposition could not be read. This objection was overruled and the plaintiffs were permitted to read the deposition of the witness as hereafter shown. To this action of the court, the defendant then and there in open court excepted.

The evidence so admitted was as follows: "I was conductor on train No. 40, engine 182, passing the cotton platform at Clarksville on Jan'y 3rd, 1896. I never got nearer the platform than 30 feet. I suppose when I passed the platform we were going about six miles an hour. I started the engine from Bonham, a distance of 67 miles from Clarksville. I made an examination of the engine at Texarkana on January 4, 1896. It had not recently been repaired to my knowledge. There had been no recent repairs made on the ash-pan, dampers or smokestack or spark-arrester of the engine. Said engine was not run on the 4th day of January. I examined the engine only once after the fire, and that was January 4th. If there was anything the matter with the spark-arrester, damper or smokestack I failed to detect it. Said engine had the usual wire covering over the top of the smokestack the same as all engines have, and it was in good condition when I made the examination above stated. If there were any repairs made on the spark-arrester between the time I turned it over at Texarkana and the time I made examination, I am not aware of it. Do not think there had been any repairs whatever done to the engine. I do not know the number of the netting used on the smokestack on this engine. It was the same as I had noticed on other engines and was in good condition. I do not know whether it was the kind approved in railway use for arresting sparks, but it was the kind used on other engines of the T. & P. To the best of my knowledge my engine did not set fire to the cotton. There were no unusual precautions taken that day to prevent the escape of fire."

J. W. ONEAL, testified for plaintiff: I was in charge of the platform known as the Oneal platform in Clarksville in 1896. The cotton was kept back 50 feet from the center of the main track. We had telegraph poles there which indicated the line, and we kept it back of this line. There was no more lint cotton about the platform than ordinary. There might be a little but not much to
44 amount to anything. Don't suppose you could have gone over the platform and picked up five pounds all over it. We kept the platform clean. We used tarpaulins there several years before the fire, but did not have any there at this time. It was a requirement of the insurance companies. In the schedule of rates they make a basis of so much for each exposure and extra hazard, and then take off so much for everything that has protection. It was at the instance of the insurance companies that we were to keep the tarpaulins but they left off this requirement later.

On cross-examination the witness said: Mr. Watson had a lot of cotton on the platform. He had been in habit of sending cotton there from the plantation and accumulating it, and would then come up and sell it. Sometimes the cotton would stay there for three or four months. Buyers would come up and sample cotton there every day. Wherever they would cut out and sample it the

cotton would be exposed. This was the condition on the 3rd of Jan'y. There were between one and two thousand bales on the platform. There were four or five rows east of the platform on the ground. The cotton was on the platform in tiers. There were no tarpaulins over the cotton at all. The insurance companies at one time insisted on keeping the tarpaulins there, but this requirement had been removed. What I mean by saying extrahazardous, was an extrahazardous risk. I consider the railway an extrahazardous risk. Railroad trains were constantly passing back and forth adjacent to the platform. It was considered an extrahazardous risk because there was likelihood of fire from passing engines. A tarpaulin is a sheet of ten or twelve ounce ducking of various sizes and ten to fifty feet long that has been treated with a dressing of some kind of fireproof material so that fire falling on it will not pass through. On the 3rd of January, the weather was dry. My recollection is, that it had been dry for some time. There was a strong wind from the northwest. It was not dry like July or August, but was a dry time for winter. I had been running the platform for 15 years, and during all that time had stored cotton there in the same way that it was stored at this time. The distance from Paris to Clarksville is 31 miles.

C. E. WILLIAMS testified for plaintiff: I am at this time agent of the Texas & Pacific railway at Paris, and was agent of that road at Clarksville on Jan'y 3, 1896. The cotton at Clarksville was lying back of the main line of the railroad fifty feet. We had a kind of a line to go by, a line over which the cotton must not be placed. The cotton was not over which line at the time of the fire. I always cautioned Mr. Oneill about it and to keep the cotton back of that certain line, and he had always done so. There was an upgrade from the west towards the platform for some distance, but when the grade got within about a couple of hundred feet from the platform it went down towards the east.

Cross-examination: On the day the fire occurred it was very dry.

B. F. CAPERTON testified for defendant: I was conductor on T. & P. train 40, and am the man whose deposition was read in evidence in this case by plaintiff. Where it is stated in my deposition that there was netting in the smokestack it is error. I certainly did not intend to make it that way. I am unable to say whether it was an error in the stenographer or an oversight in me. I know where netting is put in an extension front end engine. It is in the front end. The statement in my deposition about netting being over the smokestack was error. Yes, I was present on the trial once before and testified that it was error.

On cross-examination the witness said: When my deposition was taken I did read it over and did sign it. The notary who took it is A. S. Wadlington, now county judge of Bowie county. I don't know how the company found out that I made a mistake. The first notice I had was to come here as a witness in the case. I was

not informed by any one that I made an error. I did not know why I was called here until I got here, and when I got here I explained the mistake in the deposition. I did not intend to be negligent in signing it. I was on the train and saw the fire just as it started; I was on the rear end of the caboose.

Here the evidence closed.

The evidence having been closed the court charged the jury, among other things, that it was the duty of the railway company to use on its engines the most approved spark-arresters and to have its engines operated with ordinary care and prudence. That if they did use the most approved spark-arresters, at the time in good condition, and that the engine was then and there operated with ordinary care and prudence, plaintiff could not recover, even if
46 sparks were communicated to his cotton. Thereupon the court further charged the jury as follows: "But, if the railroad company failed to use the most approved spark-arresters and apparatus connected with the engine as in ordinary use by properly conducted railways, to prevent the escape of fire in so far as could consistently be done with the business they are conducting, it would be an act of negligence, and if under the evidence defendant was negligent in this particular, and Mr. Watson was not guilty of contributory negligence in allowing his cotton to be stored where it was, or in other matters with regard to it, and because of such negligence fire was communicated to the cotton, then you will return a verdict for the plaintiff."

Defendant then and there when this charge was given, and before the jury retired excepted to same because under the undisputed evidence, defendant's engine was equipped with the most approved spark-arrester, and the charge submitted an issue not made by the evidence. The court further charged the jury that if Mr. Watson was guilty of negligence in placing his cotton on the platform in too close proximity to the railroad track or in leaving it uncovered, or in failing to protect it, and that such act of his contributed to bring about the damage, then he could not recover.

He further charged that the action of Oneal and those under him as employés about the platform, as far as negligence was concerned, would be imputed to Watson. The defendant thereupon before the jury retired requested the court to charge the jury that when Mr. Watson placed his cotton in proximity to the railroad track he assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks, and properly operated, and if the cotton was destroyed because of the risks so assumed by him he could not recover. The court declined to give this charge or any charge on the question of assumed risk further than the following: "When this charge was requested," he stated to counsel "I assume that contributory negligence and assumed risk amount to the same thing. I can state to the jury that if Mr. Watson placed his cotton on that platform without protection or care of it, and that was an act that an ordinarily prudent man would not have done under these circumstances, and that such act

contributed to the injury, he could not recover. I do not appreciate the doctrine of assumed risk further than that charge," and then said to the jury: "As stated, gentlemen, on the question, either call it assumed risk or contributory negligence, if it was contributory negligence in placing the cotton where it was placed, and as stated before in determining whether it was contributory negligence
47 or not, you are to apply the rule as to what a reasonably prudent man, a man of ordinary prudence, would do under like circumstances, whether or not he would place the cotton there and leave it there in the condition it was left. If you find that a man of ordinary prudence would have done it, then, no matter whether it is called assumed risk or contributory negligence, it would debar plaintiff from recovery."

To the action of the court in refusing to give the charge as requested on assumed risk and holding it to be the same as contributory negligence, defendant then and there in open court and before the jury retired, excepted. And in all the matters and particulars above shown defendant now excepts, and because the things above set out in this bill do not otherwise appear of record, defendant prays that this bill of exceptions be allowed, signed and sealed by the court, and made a part of the record in this cause.

HEAD & DILLARD,
Attorneys for Defendant,
Texas & Pacific Railway Company.

Allowed.
D. E. BRYANT,
Judge Presiding in said Cause.

1/21/1901.

We hereby agree to the above as a correct bill of exceptions concerning the matters occurring on the trial of this cause.

E. S. CHAMBERS AND
A. L. BEATY,
Attorneys for S. E. Watson and
Phenix Insurance Co., Plaintiffs.
HEAD & DILLARD,
Attorney- for Defendant,
Texas & Pacific Railway Company.

(Indorsed:) No. 84. S. E. Watson *vs.* Tex. & Pac. R'y Co. Bill of exceptions. Filed Jan'y 21, 1901. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

48 *Assignment of Errors.*

In the United States Circuit Court for the Eastern District of Texas.

S. E. WATSON ET AL.
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 84.

Now comes the Texas & Pacific Railway Company, and says that there was manifest error in the trial and proceedings of this cause, in this:

First. The court erred in not sustaining the general and special exceptions of defendant, because it appeared from the pleadings herein that this action should not have been prosecuted at law, but was only properly cognizable in equity.

Second. The court erred in admitting the evidence of James Aydelotte to this effect: "I know of another fire about 60 feet on the south side of the main track. It occurred in a pile of shavings on the same day, and there were cinders over the work-bench, and on the ground where this fire was. This was about 350 — east of the cotton fire. I saw this and the cotton fire about the same time. Don't know which fire started first. There was a train in sight when both fires originated," because said evidence was irrelevant to any issue in the case, and because it was not shown, but only presumed that this fire originated from the train, and to admit this evidence to prove the origin of the fire to the cotton was to found a presumption upon a presumption.

Third. The court erred in admitting the evidence of Lee Cooper to this effect: That when he was about one and one-fourth miles east of Clarksville a freight train passed him about the time he crossed the railroad. That when he was about a quarter of a mile west of where he saw the train, he saw the grass burning on the south side and near the railway track, because this evidence was irrelevant to any issue in the case, and further, because the witness did not know how it originated, but there was only a presumption that it originated from the engine, and to permit evidence as to this fire to show the origin of the fire which burned the cotton, or negligence in setting it out was to found a presumption upon a presumption.

Fourth. The court erred in admitting the evidence of the witness H. A. Green, to the effect, that after leaving one fire he went
49 down the railroad track towards home and saw the grass on fire in two other places. That they were not extensive, but burned over only small patches, because said evidence was irrelevant and because the witness stated that he did not know how these fires originated, but knew no way they could have originated except from the train, so that it was a presumption as to how they did originate, and to allow this evidence for the purpose of showing the origin of the cotton fire and negligence upon the part of the

evidence in setting it out was to found a presumption upon a presumption.

Fifth. The court erred in admitting the evidence of the witness L. A. Rains, to the effect that after he had seen one fire set out by the train the grass was also seen on fire about 150 yards from his house, and about 40 feet from the track, and that another fire was burning about 300 yards east of his house and about 60 feet from the track, because said evidence was irrelevant and immaterial, and because further, the origin of these fires was unknown, and to permit evidence to be given as to them for the purpose of showing that the cotton fire originated from defendant's engine or that defendant negligently set it out was to found a presumption upon a presumption.

Sixth. The court erred in admitting the evidence of Lon Martin, James Aydelotte, Sam Taylor and Andrew Deaver to the effect that they did not know of any opportunity and saw no opportunity for the cotton to have caught fire except from the locomotive drawing defendant's train, because said evidence was irrelevant and because it was in the nature of a conclusion of the witness to the effect that the fire did originate from the engine.

Seventh. The court erred in permitting plaintiff to put to the witness Wells, the hypothetical question: "Suppose an engine should come along and in the course of four miles and a quarter, set out, say eight fires, should set fire to the grass in some of these places, set fire to shavings sixty feet from the right of way, set cotton on fire, and that live cinders could be seen falling, and fell and smoked after falling on the ground, over work-benches and things and over platforms, would you say there was anything wrong about the operation or construction of that engine, or would you say that it was all right, and suppose that instead of eight fires there were five, under the conditions named to you, what would you say?" And in permitting the answer of the witness: "An engine that would do as you have stated is doing something unusual, very unusual. If there was dry and combustible material close to the track, a spark from the ash-pan might drop among it and set it afire. What you have said might occur, but it would be very unusual. I could
50 not say there would be anything wrong in the operation of the engine, but there might be something deranged about the ash-pan, is the only way I can account for it. If the engine did set out sparks in the manner stated by you, I cannot believe the engine was in quite perfect condition," because the evidence sought to be elicited was not such as was the subject of expert testimony, but the endeavor was to substitute a conclusion of the witness for that of the jury, and it was not allowable by a hypothetical question such as this and the answer thereto, to prove *that* the bad equipment of the engine in the face of actual testimony that the equipment was in good order.

Eighth. The court erred in permitting the plaintiff to read the deposition of the witness B. F. Caperton, because the witness was actually present in court and tendered to the plaintiffs in person and if plaintiffs wished his testimony, it was their duty to place the witness upon the stand.

Ninth. The court erred in charging the jury as follows: "But if "the railroad company failed to use the most approved spark-"arresters and apparatus connected with the engine, as is in ordinary "use by properly conducted railways, to prevent the escape of fire "in so far as could consistently be done with the business they are "conducting, it would be an act of negligence, and if, under the "evidence, defendant was negligent in this particular, and Mr. "Watson was not guilty of contributory negligence in allowing his "cotton to be stored where it was, and other matters with regard to "it, and because of such negligence fire was communicated to the "cotton, then you will return a verdict for the plaintiff," because under the undisputed evidence defendant's engine was equipped with the most approved spark-arrester, and the charge submitted an issue not made by the evidence.

Tenth. The court erred in declining at defendant's request to give a charge to the effect that when Mr. Watson placed his cotton in proximity to the railroad track he assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks, and properly operated, and if the cotton was destroyed because of risks so assumed by him, he could not recover and in saying that he assumed that contributory negligence and assumed risk amounted to the same thing, and in giving instead of such charge the following: "As stated, gentlemen, on the question either call it assumed risk or contributory negligence, if it was contributory negligence in placing the cotton where it was placed, and as stated before, in determining whether it was
51 contributory negligence or not, you are to apply the rule to what a reasonably prudent man, a man of ordinary prudence, would do under like circumstances, whether or not he would place the cotton there and leave it there in the condition it was left. If you find that a man of ordinary prudence would have done it, then, no matter whether it is called assumed risk or contributory negligence, it would debar plaintiff from recovery," because contributory negligence and assumed risk are not the same thing, and because whether Mr. Watson was guilty of contributory negligence or not, if he placed his cotton in close proximity to the railroad track, he assumed all risk likely to arise from fire set out by engines properly equipped and operated, and defendant was entitled to have the jury specifically so told.

11. The court erred in refusing to admit in evidence the stipulations and exemptions contained in the leases under which O'Neill held possession and occupancy of the platform.

Wherefore, the defendant, The Texas & Pacific Railway Company, prays that the judgment of the said United States circuit court for the eastern district of Texas be, in all things reversed, annulled and held for naught, and that it be restored to all things it has lost by occasion thereof.

HEAD & DILLARD,

Attorneys for Defendant, Texas & Pacific Railway Company.

(Indorsed:) No. 84. S. E. Watson *vs.* Tex. & Pac. R'y Co. Assignment of errors. Filed Jan'y 21st, 1901. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

Application for Writ of Error.

In the United States Circuit Court for the Eastern District of Texas.

S. E. WATSON ET AL.
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 84.

To the honorable judges of said court:

Now comes the defendant, The Texas & Pacific Railway Company, and shows unto your honors that in the above cause on heretofore, to wit: the 20th day of November, 1900, judgment was
52 rendered in behalf of S. E. Watson against the Texas & Pacific Railway Company, for the sum of two thousand and seventeen and 37/100 dollars, with six per cent. per annum interest from date. In said cause wherein The Phenix Insurance Company of Brooklyn was also plaintiff judgment was entered in behalf of the defendant railway company. That said judgment, after due notice and acceptance of service, has been so served as to allow the defendant, The Texas & Pacific Railway Company, to carry the same by writ of error to the United States circuit court of appeals as to said S. E. Watson alone. That said Texas & Pacific Railway Company is desirous of carrying said judgment to our United States circuit court of appeals, and of suspending execution on the same pending the hearing of said writ of error. That said Texas & Pacific Railway Company has duly filed assignments of error as required by law, and herewith tenders a good and sufficient bond. And because in the record and proceedings as also in the rendition of said judgment in behalf of said S. E. Watson against it manifest error hath happened to the great damage of said Texas & Pacific Railway Company, it prays that a writ of error be allowed it in said cause to the United States circuit court of appeals in and for the fifth circuit, and returnable as required by law, so that the said circuit court of appeals may cause to be done further therein whatsoever shall be necessary to correct said error.

HEAD & DILLARD,
Attorneys for Texas & Pacific R'y Co.

Upon consideration of the above and foregoing application, writ of error is allowed by me, David E. Bryant, district judge and judge presiding in said cause.

This 21st day of January, 1901.

D. E. BRYANT, [L. S.]
District Judge and Judge Presiding at the Trial.

(Indorsed:) No. 84. S. E. Watson *vs.* Texas & Pac. R'y Co. Application for writ of error. Filed Jan'y 21, 1901. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

53 *Application for Summons and Severance.*

In the United States Circuit Court for the Eastern District of Texas.

S. E. WATSON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 84.

To the honorable judges of said court:

Now comes the defendant, The Texas & Pacific Railway Company, and shows unto your honors that heretofore, to wit: on the 20th day of November, 1900, in this honorable court, in the above cause *and* which S. E. Watson and The Phenix Insurance Company of Brooklyn, were plaintiffs, and The Texas & Pacific Railway Company, was defendant, judgment was entered in behalf of defendant against the plaintiff, The Phenix Insurance Company of Brooklyn, except for costs, but that judgment was entered in behalf of S. E. Watson against the defendant, The Texas & Pacific Railway Company, for the sum of two thousand and seventeen and 37/100 dollars, with interest from date of judgment at 6 per cent. per annum and costs of suit. That defendant has no cause of complaint as to the judgment in its favor against the Phenix Insurance Company of Brooklyn, and the Phenix Insurance Company of Brooklyn is in no way complaining of said judgment against it in behalf of defendant, The Texas & Pacific Railway Company, but defendant does have cause of complaint as to the judgment against it in behalf of S. E. Watson and is desirous of carrying the same from this court to the United States circuit court of appeals for the fifth circuit by writ of error, and it is so desirous of carrying said judgment to said United States circuit court of appeals for having the same reviewed only as between it and said Watson.

Wherefore it prays that said S. E. Watson and the Phenix Insurance Company of Brooklyn be duly summoned to answer this application; that there be a severance of said judgment and said cause of action so that said judgment may be carried for review to our said United States circuit court of appeals by writ of error only as to said S. E. Watson.

HEAD & DILLARD,
Attorneys for Defendant, Texas & Pacific R'y Co.

54 S. E. WATSON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. }

We, S. E. Watson, and the Phenix Insurance Company of Brooklyn, hereby waive summons, citation and further notice upon the above application for summons and severance of this cause, and we consent that said cause of action and judgment may be severed and a writ of error may be prosecuted by defendant The Texas & Pacific

Railway Company, as to said S. E. Watson alone, and citation and notice on said S. E. Watson is also waived. The Phenix Insurance Company has no complaint as to said judgment.

This 21 day of January, 1901.

PHENIX INSURANCE COMPANY OF BROOKLYN,
By A. L. BEATY, *Its Attorney.*
S. E. WATSON,
By E. S. CHAMBERS &
A. L. BEATY, *His Attorneys.*

(Indorsed:) No. 84. S. E. Watson *vs.* Tex. & Pac. R'y Co. Application for summons and severance. Filed Jan'y 21, 1901. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

S. E. WATSON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 84.

On this day came on to be heard by me the application of defendant The Texas & Pacific Railway Company, for a summons and severance in this cause, and at the same time was presented to me the acceptance of service as to said application, and the consent of plaintiffs that the cause of action and judgment might be severed, and that defendant, The Texas & Pacific R'y Co., might prosecute its writ of error on said judgment as to S. E. Watson alone. It is therefore considered, ordered and adjudged that said cause of action and judgment be so severed—that said judgment shall remain in full force and effect as it now is as between the Texas & Pacific Railway Company and the Phenix Insurance Company of Brooklyn; but it is further ordered that the said, The Texas & Pacific R'y Co. have, and there is hereby granted unto it the right to prosecute its writ of error herein as to said S. E. Watson alone.

This 21 day of January, 1901.

D. E. BRYANT,
District Judge and Judge Presiding at the Trial of said Cause.

55 (Indorsed:) No. 84. S. E. Watson *vs.* Tex. & Pac. R'y Co. Order on application for summons and severance. Filed Jan'y 21, 1901. C. Dart, clerk, by H. H. Kirkpatrick, dep.

In the United States Circuit Court for the Eastern District of Texas.

S. E. WATSON
vs.
TEXAS & PACIFIC RAILWAY COMPANY. } No. 84.

Citation is hereby waived and service of the writ of error is hereby accepted in this cause without further notice.
This 21 day of January, 1901.

S. E. WATSON,
By E. S. CHAMBERS AND
A. L. BEATY,
His Attorneys.

(Indorsed:) No. 84. S. E. Watson *vs.* Tex. & Pac. R'y Co. Acceptance of service of writ of error.
(Further indorsed:) Filed Jan'y 21, 1900. C. Dart, cl'k, by H. H. Kirkpatrick, deputy.

Bond for Writ of Error.

In the United States Circuit Court for the Eastern District of Texas, Sitting at Paris.

S. E. WATSON
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Know all men by these presents: that we, The Texas & Pacific Railway Company, as principal, and Edw'n O. Tennison and J. R. Tennison, as sureties, are held and firmly bound unto S. E. Watson in the full and just sum of forty-five hundred dollars, to be paid to said S. E. Watson, his heirs, executors, administrators or assigns, to which payment, well and truly to be made we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Signed with our hands, and sealed with our seals and dated this the — day of January, one thousand nine hundred and one.

56 Whereas, lately at a regular term of the United States circuit court for the eastern district of Texas, held at Paris, in a suit pending in said court between S. E. Watson and The Phenix Insurance Company of Brooklyn, plaintiffs, and The Texas & Pacific Railway Company, defendant, numbered 84 on the docket of said court, judgment was rendered on the 20th day of November, 1900, in favor of the said defendant; that the plaintiff, The Phenix Insurance Company of Brooklyn, take nothing by said action but that defendant shall pay to the officers of the court the costs incurred by that plaintiff, but was further rendered in favor of S. E. Watson against defendant, The Texas & Pacific Railway Company, for the sum of two thousand, seventeen and 37/100 dollars, with interest at

six per cent. per annum from the date of said judgment until paid, together with all costs expended, and the said Texas & Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office to reverse judgment in the aforesaid suit, and citation on the same having been duly waived and service of the writ of error having been duly accepted by said S. E. Watson, and summons and severance having been duly had as to said Phenix Insurance Company of Brooklyn. Now the condition of the above obligation is such that if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect, and answer all damages and costs, if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and effect.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By HEAD & DILLARD, *Its Attorneys.* [L. S.]
EDW. O. TENISON. [L. S.]
J. R. TENISON. [L. S.]

The above bond was examined and approved by me, David E. Bryant, United States district judge, and judge presiding at said trial, this the 21 day of January, 1901.

D. E. BRYANT, *Judge.*

(Indorsed:) No. 84. S. E. Watson *vs.* Tex. & Pac. R'y Co. Bond for writ of error. Filed Jan. 21, 1901. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

57 (*Clerk's Certificate.*)

In the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit, Holding Sessions at Paris, Texas.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, in the fifth circuit, do hereby certify that the foregoing is a true and correct copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case numbered 84 on the law docket of said court, at Paris, entitled S. E. Watson, *et al.*, *vs.* The Texas and Pacific Railway Company, as the same now appears on file and of record in my office, at Paris.

Witness my official signature and the seal of said circuit court, at Paris, Texas, this 8th day of February, A. D. 1901.

[SEAL.]

C. DART,
Clerk U. S. Circuit Court, E. D. Texas,
By H. H. KIRKPATRICK, *Deputy.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable judges of the circuit court of the United States for the eastern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between S. E. Watson, plaintiff, and The Phenix Insurance Company of Brooklyn, plaintiff, and The Texas & Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said, The Texas & Pacific Railway Company, as by its complaint appears; we being willing that error, if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at the city of New Orleans, in the State of Louisiana, within thirty days from the date hereof in the said United States circuit court of appeals, to be then and there held, that the record and proceed-
58 ings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 21st day of January, in the year of our Lord one thousand nine hundred and one.

[SEAL.] C. DART,
Clerk of the United States Circuit Court
for the Eastern District of Texas,
By H. H. KIRKPATRICK, *Deputy.*

Allowed the 21 day of January, 1901, by David E. Bryant, district judge and judge presiding at said trial.

D. E. BRYANT,
District Judge and Judge Presiding at said Trial.

I, C. Dart, clerk of the circuit court of the United States, for the eastern district of Texas, hereby certify that I received this writ on the 21st day of January, 1901, and that on this 8th day of February, 1901, I have transmitted to the clerk of the United States circuit court of appeals for the fifth circuit, at New Orleans, La., through Messrs. Head & Dillard, attorneys of record for plaintiff in error a true copy of the record and proceedings in the within-named cause, duly certified under my hand and seal.

Witness my hand, and the seal of said court at my office in the city of Paris, the day and date last above named.

[SEAL.] C. DART, *Clerk*,
By H. H. KIRKPATRICK, *Deputy.*

59 United States Circuit Court of Appeals for the Fifth Circuit November Term, 1900.

MAY 8TH, 1901.

(Extract from Minutes.)

TEXAS & PACIFIC RAILWAY COMPANY
vs.
S. E. WATSON. } No. 1035.

This cause was regularly called this day, and submitted to the court upon briefs of counsel heretofore filed.

60 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901.

DECEMBER 3, 1901.

(Extract from Minutes.)

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
S. E. WATSON, Defendant in Error. } No. 1035.

This cause came on to be heard on the transcript of the record, from the circuit court of the United States for the eastern district of Texas, and was argued by counsel.

On consideration whereof; it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed.

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the sureties on the writ of error bond herein, Edw. O. Tension and J. R. Tension, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

61 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1901.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
S. E. WATSON, Defendant in Error. } No. 1035.

Error to the circuit court of the United States for the eastern district of Texas.

Before Pardee, McCormick, and Shelby, circuit judges.

By the COURT: In this case, the evidence having been closed the trial judge charged the jury, among other things, apparently on his own motion, that it was the duty of the railway company to use on

its engines the most approved spark-arresters and to have its engines operated with ordinary care and prudence; that if the defendant did use the most approved spark-arresters, at the time in good condition, and that the engine was then and there operated with ordinary care and prudence, plaintiff could not recover, even if sparks were communicated to his cotton. The requested charges presented by the defendant, so far as they are sound, are embraced in the charge just given. It is true that the situation
62 of the plaintiff's cotton required a degree of care on the plaintiff's part greater than would have been required if the cotton had been situated further from the track on which the defendant's engines in the conduct of its business were compelled to pass. And if the idea of assumed risk, which the defendant's counsel pressed, had taken the shape of an instruction to the jury as to the measure of prudent care which the situation exacted of the plaintiff, we are not prepared to say that a helpful instruction might not have been given to the jury on that subject; and if the request had been within the proper limitations, we are not prepared to say that the refusing of it, or the qualifying of it, as appears to have been done by the trial judge, would not have presented ground for reversal.

The trial court clearly erred in permitting the plaintiff to read the deposition of the witness B. F. Caperton when the witness was actually present in court and tendered to the plaintiff in person. Railway Company *v.* Wilder, 92 Fed. 297. Until the witness, who was present in court, and whose presence in court was known to the plaintiff, had been called by the defendant and delivered his testimony on the stand, the plaintiff could not use the deposition in question, and then only for the purpose of impeachment, after having laid the proper predicate and given the witness opportunity
63 to explain the mistake or error in his deposition. In view of the fact that the witness was called by the defendant after the deposition had been admitted over the defendant's objection, and gave fully his explanation of the deposition and his testimony as to the subject to which it related, we conclude that the error committed is not sufficiently grave in its results to require us to reverse the case.

The rulings complained of in the other suggestions of error are substantially sound.

The judgment of the circuit court is affirmed.

64 United States Circuit Court of Appeals, Fifth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
S. E. WATSON, Defendant in Error. } No. 1035.

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above-entitled cause, there is manifest error in this to wit:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas.

II.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in not sustaining the general and special exceptions of plaintiff in error, because it appeared from the pleadings herein that this action should not have been prosecuted at law, but was only properly cognizable in equity.

III.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in admitting the evidence of James Aydelotte, to this effect:

"I know of another fire about sixty feet on the south side of the main track. It occurred in a pile of shavings on the same day, and there were cinders over the work-bench, and on the ground where this fire was. This was about 350 feet east of the cotton fire. I saw this, and the cotton fire, about the same time. Don't know which fire occurred first. There was a train in sight when both
65 fires originated,"

Because said evidence was irrelevant to any issue in the case, and because it was not shown, but only presumed that this fire originated from the train, and to admit this evidence to prove the origin of the fire to the cotton was to found a presumption on a presumption.

IV.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in admitting the evidence of Lee Cooper, to this effect:

"That when he was about one and one-fourth miles east of Clarksville, a freight train passed him about the time he crossed the railroad. That when he was about a quarter of a mile west of where he saw the train he saw the grass burning on the south side, and near the railway track,"

Because this evidence was irrelevant to any issue in the case, and further, because the witness did not know how it originated, but there was only a presumption that it originated from the engine, and to permit evidence as to this fire to show the origin of the fire which burned the cotton, or negligence in setting it out, was to found a presumption upon a presumption.

V.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and

in holding that said court committed no error in admitting the evidence of the witness H. A. Green, to the effect that after leaving one fire, he went down the railroad track towards home and saw the grass on fire in two other places; that they were not extensive, but burned over only small patches, because said evidence was irrelevent, and because the witness stated that he did not know how these fires originated, but knew no way they could have originated, except from the train, so that it was a presumption as to how they did originate, and to allow this evidence for the purpose of
66 showing the origin of the cotton fire, and negligence upon the part of the evidence in setting it out, was to found a presumption upon a presumption.

VI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in admitting the evidence of the witness L. A. Rains, to the effect that after he had seen one fire set out by the train, the grass was also seen on fire about 150 yards from his house, and about 40 feet from the track, and that another fire was burning about 300 yards east of his house, and about 600 feet from the track, because said evidence was irrelevant and immaterial, and because further, the origin of these fires was unknown, and to permit evidence to be given as to them for the purpose of showing that the cotton fire originated from plaintiff in error's engine, or that plaintiff in error negligently set it out, was to found a presumption on a presumption.

VII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in admitting the evidence of Lon Martin, James Aydelotte, Sam Taylor and Andrew Deaver, to the effect that they did not know of any opportunity and saw no opportunity for the cotton to have caught fire except from the locomotive drawing plaintiff in error's train, because said evidence was irrelevant, and because it was in the nature of a conclusion of the witness, to the effect that the fire did originate from the engine.

VIII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in permitting defendant in error to put to the witness, Wells, the hypothetical question:
67 "Suppose an engine should come along, and in the course of four miles and a quarter, set out, say eight fires, should set fire to the grass in some of these places, set fire to shavings 60 feet from the right of way, set cotton on fire and that live cinders could be seen falling, and fell and smoked after falling on the ground, over work-benches and things and over platforms, would

you say there was anything wrong about the operation or construction of that engine, or would you say that it was all right, and suppose that instead of eight fires there were five, under the conditions named to you, what would you say?"

And in permitting the answer of the witness:

"An engine that would do as you have stated, is doing something unusual, very unusual. If there was dry and combustible material close to the track, a spark from the ash-pan might drop among it and set it afire. What you have said might occur, but it would be very unusual. I could not say there would be anything wrong in the operation of the engine, but there might be something deranged about the ash-pan, is the only way I can account for it. If the engine did set out sparks in the manner stated by you, I cannot believe the engine was in quite perfect condition."

Because the evidence sought to be elicited was not such as was the subject of expert testimony, but the endeavor was to substitute the conclusion of the witness for that of the jury, and it was not allowable by a hypothetical question such as this, and the answer thereto, to prove *that* the bad equipment of the engine in the face of actual testimony that the equipment was in good order.

IX.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in permitting the defendant in error to read the deposition of the witness B. F. Caperton, because the witness was actually present in court and tendered to defendant in error in person, and if the defendant in error wished his testimony it was his duty to place the witness upon the stand.

68 X.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in charging the jury as follows:

"But if the railroad company failed to use the most approved spark arresters and apparatus connected with the engine, as is in ordinary use by properly conducted railways, to prevent the escape of fire in so far as could consistently be done with the business they are conducting, it would be an act of negligence, and if under the evidence defendant was negligent in this particular, and Mr. Watson was not guilty of contributory negligence in allowing his cotton to be stored where it was and other matters with regard to it, and because of such negligence fire was communicated to the cotton, then you will return a verdict for the plaintiff."

Because under the undisputed evidence plaintiff in error's engine was equipped with the most approved spark-arrester, and the charge submitted an issue not made by the evidence.

XI.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to give a charge requested by plaintiff in error *error*, to the effect that when Mr. Watson placed his cotton in proximity to the railroad track he assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks, and properly operated, and if the cotton was destroyed because of risks so assumed by him, he could not recover, and in saying that he assumed that contributory negligence and assumed risk amounted to the same thing.

And in giving instead of such charge, the following: "As stated, gentlemen on the question either call it assumed risk or contributory negligence if it was contributory negligence, in placing the cotton where it was placed, and as stated before, in determining
69 whether it was contributory negligence or not, you are to apply the rule to what a reasonably prudent man, a man of ordinary prudence would do under like circumstances, whether or not he would place the cotton there, and leave it there in the condition it was left. If you find that a man of ordinary prudence would have done it, then, no matter whether it is called assumed risk or contributory negligence, it would debar plaintiff from recovery." because contributory negligence and assumed risk are not the same thing, and because whether Mr. Watson was guilty of contributory negligence or not, if he placed this cotton in close proximity to the railroad track, he assumed all risk likely to arise from fire set out by engines properly equipped and operated, and plaintiff in error was entitled to have the jury specifically so told.

XII.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the eastern district of Texas, and in holding that said court committed no error in refusing to admit in evidence the stipulations and exemptions contained in the leases under which O'Neill held possession and occupancy of the platform.

Wherefore, The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment be reversed, and it will ever pray.

T. J. FREEMAN,
Attorney for The Texas and Pacific Railway Company, Plaintiff in Error.

Endorsed: No. 1035. The Texas & Pacific R'y Co., plaintiff in error, *vs.* S. E. Watson, defendant in error. Assignments of error. Filed December 31, 1901. Charles H. Lednum, clerk.

70 Know all men by these presents, that we, The Texas and Pacific Railway Company, as principal, and George J. Gould, of Lakewood, New Jersey, as surety, are held and firmly bound unto S. E. Watson in the full and just sum of four thousand (4,000) dollars, to be paid to the said S. E. Watson or his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of December in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a regular term of the circuit court of the United States for the eastern district of Texas and on November 20, 1900 in a suit depending in said court, between S. E. Watson, plaintiff, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against said railway company for the sum of two thousand and seventeen, 37/100 dollars ($2,017.37) besides costs of suit; and

Whereas from said judgment the said railway company duly obtained a writ of error from the United States circuit court of appeals for the fifth circuit, which court, on the third day of December 1901, rendered a judgment affirming the said judgment, and the said The Texas and Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said S. E. Watson or his attorneys of record citing and admonishing him to be and appear at a Supreme Court of the United States at Washington within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Texas and Pacific Railway Company shall prosecute its said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS AND PACIFIC
RAILWAY COMPANY,
By GEORGE J. GOULD, *Pres't.*
GEORGE J. GOULD. [SEAL.]

Sealed and delivered in presence of—
D. D. DUNCAN.

[Corporate Seal.]

Attest: C. E. SATTERLEE, *Sec'y.*

Approved to operate as a supersedeas by
EDWARD D. WHITE,
Justice of the Supreme Court of the United States.

[Endorsed:] No. 1035. The Texas & Pacific R'y Co. *v.* S. E. Watson. Supersedeas bond. Filed Dec. 31, 1901. Charles H. Lednum, clerk.

71 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you, or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and S. E. Watson, defendant in error, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of December, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1035. The Texas & Pacific R'y Co. *v.* S. E. Watson. Writ of error. Filed December 31, 1901. Charles H. Lednum, clerk.

A copy of this writ is this day lodged in my office for the use of the defendant in error.
December 31, 1901.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

72 UNITED STATES OF AMERICA, ss:

To Samuel E. Watson or his attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the

fifth circuit, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 28th day of December, in the year of our Lord one thousand nine hundred and one.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

On this 2nd day of January, in the year of our Lord one thousand nine hundred and two, personally appeared before me, the subscriber, Jno. C. Wall, of Sherman, Grayson county, Texas, and makes oath that he delivered a true copy of the within citation to Amos L. Beaty, attorney of record for Samuel E. Watson.

JNO. C. WALL,
Sherman, Grayson County, Texas.

Sworn to and subscribed the 2nd day of January, A. D. 1902.

[Seal Notary Public, County of Grayson, Texas.]

CHARLES KASSEL,
Notary Public for Grayson County, Texas.

My commission — in June, 1903.

[Endorsed:] Filed Jan'y 6, 1902. Charles H. Lednum, clerk.

73 *Clerk's Certificate.*

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignments of error and all proceedings had in cause No. 1035, The Texas & Pacific Railway Company, plaintiff in error, *vs.* S. E. Watson, defendant in error, except that the original writ of error and citation in error are included therein, instead of copies thereof, as fully as the same remains of record and on file in my office at New Orleans, Louisiana.

Witness my hand officially and the seal of said court at New Orleans, Louisiana, this 10th day of January, A. D. 1902.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No. 18371. U. S. circuit court of appeal, 5th circuit. Term No. 223. The Texas and Pacific Railway Company, plaintiff in error, *vs.* Samuel E. Watson. Filed January 15, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. SAMUEL E. WATSON.	No. 223.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This case was originally brought in the District Court of Texas for the County of Red River on the twenty-fourth day of April, eighteen hundred and ninety-six, and was removed into the Circuit Court of the United States for the Eastern District of Texas on the ground that a federal question was involved by reason of the incorporation of the defendant under the laws of the United States.

Plaintiff in his amended original petition, in which the Phœnix Insurance Company of Brooklyn joined as

plaintiff (Tr., p. 6), claimed damages for the loss of sixty-four bales of cotton by fire while stored and located upon a platform near the line of the railway company in the Town of Clarksville ; alleged negligence of the railway company in the construction, equipment and operation of its train of cars ; and also that the said fire originated from sparks, cinders and fire emitted from a certain engine of defendant while passing the platform. They also alleged that the defendant, its agents and employees were grossly careless and negligent in the manner of operating the train, running it at a high and dangerous rate of speed and failing to exercise ordinary care in such operation.

It was also stated that the insurance company had paid to Watson $1,077.37 in full settlement of his claim upon its policy of insurance and that it had received from him an assignment of his claim against the railway company. Defendant subsequently made settlement with the insurance company for its part of Watson's claim (Tr., p. 24).

Defendant (Tr.,pp. 14, 15) demurred to the petition generally and specially (as to the effect of the assignment to the insurance company) ; pleaded the general issue ; and for special answer alleged that plaintiff's damages, if any, were caused and contributed to by his own negligence and want of care and resulted from a risk assumed by him ; denied any negligence on its part, alleging that its engines were properly equipped with the best appliances for arresting the escaped sparks of fire, and that they were properly manned and operated and in good condition. It also claimed that the destruction of the cotton was due to want of care on the part of its owner, his agents and servants, in that they placed said cotton knowingly in close proximity to the track. Defendant

further alleged that the platform was operated by one O'Neill under certain leases by the terms of which defendant was released from all liability for loss or damage by fire whether occasioned by sparks from locomotives or otherwise.

Plaintiff filed exceptions to the answer.

Defendant's demurrer and special exceptions were overruled (Tr., p. 19).

There was a verdict for plaintiff for $2,017.37 for which sum judgment was entered. The United States Court of Appeals for the Fifth Circuit reviewed the judgment on writ of error and gave judgment of affirmance from which a writ of error has been sued out to this court.

Assignments of Error.

I.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court of the Eastern District of Texas.

II.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in not sustaining the general and special exceptions of plaintiff in error, because it appeared from the pleadings herein that this action should not have been prosecuted at law, but was only properly cognizable in equity.

III.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in admitting the evidence of James Aydelotte to this effect:

"I know of another fire about sixty feet on the south side of the main track. It occurred in a pile of shavings on the same day, and there were cinders over the work-bench and on the ground where this fire was. This was about 350 feet east of the cotton fire. I saw this and the cotton fire about the same time. Don't know which fire occurred first. There was a train in sight when both fires originated."

Because said evidence was irrelevant to any issue in the case, and because it was not shown, but only presumed, that this fire originated from the train, and to admit this evidence to prove the origin of the fire to the cotton was to found a presumption on a presumption.

IV.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in admitting the evidence of Lee Cooper to this effect:

"That when he was about one and one-fourth miles east of Clarksville a freight train passed him about the time he crossed the railroad. That when he was about a quarter of a mile west of where he saw the train he saw the grass burning on the south side, and near the railway track."

Because this evidence was irrelevant to any issue in the case, and further, because the witness did not know

how it originated, bnt there was only a presumption that it originated from the engine, and to permit evidence as to this fire to show the origin of the fire which burned the cotton, or negligence in setting it out, was to found a presumption upon a presumption.

V.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in admitting the evidence of the witness H. A. Green, to the effect that after leaving one fire, he went down the railroad track towards home and saw the grass on fire in two other places ; that they were not extensive, but burned over only small patches, because said evidence was irrelevent, and because the witness stated that he did not know how these fires originated, but knew no way they could have originated except from the train, so that it was a presumption as to how they did originate, and to allow this evidence for the purpose of showing the origin of the cotton fire, and negligence upon the part of the evidence [defendant] in setting it out, was to found a presumtpion upon a presumption.

VI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in admitting the evidence of the witness L. A. Rains, to the effect that, after he had seen one fire set out by the train, the grass was also

seen on fire about 150 yards from his house, and about 40 feet from the track, and that another fire was burning about 300 yards east of his house, and about 600 feet from the track, because said evidence was irrelevant and immaterial, and because, further, the origin of these fires was unknown, and to permit evidence to be given as to them for the purpose of showing that the cotton fire originated from plaintiff-in-error's engine, or that the plaintiff in error negligently set it out, was to found a presumption on a presumption.

VII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in admitting the evidence of Lon Martin, James Aydelotte, Sam Taylor and Andrew Deaver, to the effect that they did not know of any opportunity, and saw no opportunity, for the cotton to have caught fire except from the locomotive drawing plaintiff-in-error's train, because said evidence was irrelevant, and because it was in the nature of conclusion of the witness to the effect that the fire did originate from the engine.

VIII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in permitting defendant in error to put to the witness Wells the hypothetical question :

"Suppose an engine should come along, and in the course of four miles and a quarter, set out, say eight fires, should set fire to the grass in some of these places, set fire to shavings 60 feet from the right of way, set cotton on fire and that live cinders could be seen falling, and fell and smoked after falling on the ground, over work-benches and things and over platforms, would you say there was anything wrong about the operation or construction of that engine, or would you say that it was all right, and suppose that instead of eight fires there were five, under the conditions named to you, what would you say?"

And in permitting the answer of the witness:

"An engine that would do as you have stated is doing something unusual, very unusual. If there was dry and combustible material close to the track, a spark from the ash pan might drop among it and set it afire. What you have said might occur, but it would be very unusual. I could not say there would be anything wrong in the operation of the engine, but there might be something deranged about the ash pan, is the only way I can account for it. If the engine did set out sparks in the manner stated by you, I cannot believe the engine was in quite perfect condition."

Because the evidence sought to be elicited was not such as was the subject of expert testimony, but the endeavor was to substitute the conclusion of the witness for that of the jury, and it was not allowable by a hypothetical question such as this, and the answer thereto, to prove that the bad equipment of the engine in the face of actual testimony that the equipment was in good order.

IX.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in permitting the defendant

in error to read the deposition of the witness B. F. Caperton, because the witness was actually present in Court and tendered the defendant in error in person, and if the defendant in error his testimony it was his duty to place the witness upon the stand.

X.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in charging the jury as follows :

" But if the railroad company failed to use the most approved spark arresters the apparatus connected with the engine, as is in ordinary use by properly conducted railways, to prevent the escape of fire in so far as could consistently be done with the business they are conducting, it would be an act of negligence, and if under the evidence defendant was negligent in this particular, and Mr. Watson was not guilty of contributory negligence in allowing his cotton to be stored where it was and others matters with regard to it, and because of such negligence fire was communicated to the cotton, then you will return a verdict for the plaintiff."

Because under the undisputed evidence plaintiff in error's engine was equipped with the most approved spark arrester, and the charge submitted an issue not made by the evidence.

XI.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said

Court committed no error in refusing to give a charge requested by plaintiff in error, to the effect that when Mr. Watson placed his cotton in proximity to the railroad track he assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks, and properly operated, and if the cotton was destroyed because of risks so assumed by him, he could not recover, and in saying that he assume[d] that contributory negligence and assumed risk amounted to the same thing.

And in giving, instead of such charge, the following: "As stated, gentlemen, on the question, either call it assumed risk or contributory negligence, if it was contributory negligence, in placing the cotton where it was placed, and as stated before in determining whether it was contributory negligence or not, you are to apply the rule to what a reasonably prudent man, a man of ordinary prudence would do under like circumstances, whether or not he would place the cotton there, and leave it there in the condition it was left. If you find that a man of ordinary prudence would have done it, then, no matter whether it is called assumed risk or contributory negligence, it would debar plaintiff from recovery," because contributory negligence and assumed risk are not the same thing, and because whether Mr. Watson was guilty of contributory negligence or not, if he placed his cotton in close proximity to the railroad track, he assumed all risk likely to arise from fire set out by engines properly equipped and operated, and plaintiff in error was entitled to have the jury specifically so told.

XII.

The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Eastern District of Texas, and in holding that said Court committed no error in refusing to admit in evidence the stipulations and exemptions contained in the leases under which O'Neill held possession and occupancy of the platform.

BRIEF.

I.

There was error in admitting evidence of there being fires in other places without proof that they were caused by defendant's engines.

This question is preserved in the third, fourth, fifth and sixth assignments of error *(ante.*, pp. 4, 5), and by objections made at the trial and overruled by the Court *(Tr.*, pp. 25, 26, 28, 29).

We are not contending that evidence of other fires set out by railway engines is not admissible to show that the fire on account of which the suit is brought was probably so set out and also to show the probable negligence on the part of the owner of the engine in setting out the fire in question. In some jurisdictions it is held that such evidence is not admissible, but the great weight of authority is to the contrary and in the

United States Courts it is held that such evidence is admissible, the rule being established not only by many decisions of the lower courts but by the Supreme Court of the United States. *Grand Trunk Railway vs. Richardson, 91 U. S., 454.* What we are contending for is that when it is claimed that a railway engine set out a fire and another fire is seen near the railway track about the time the engine passes, but the origin of the second fire is not known, it is not, on account of its proximity to the railway, permissible to presume that it originated from the engine and then further presume that the fire out of which the litigation grew must also have originated from the engine or that there was negligence in setting it out.

It is well settled that presumption cannot be based upon presumptions. You can not go on indefinitely presuming a series of effects from a presumed series of causes. When a fact is established all legitmate presumptions may be drawn from it; but when we have to presume a fact, and then desire from this presumption to draw a presumption of another fact we are going too far.

The case of *St. Louis and San Francisco Ry. Co. vs. Jones, 59 Ark., 105*, s. c., *26 S. W. R., 595*, holds that evidence of other fires is inadmissible in the absence of proof that the fires were caused by locomotives of the defendant.

The case of *Musselwhite vs. Receivers, 4 Hughes, 166, 17 Fed. Cas., 1070, Case No. 9972*, is of some help to us. There an engine was seen to pass. Sparks were seen escaping from it, and within five minutes fire was noticed in a building by which it had passed. There was a broken window pane near the railway track where the engine had passed. The Court held that

the evidence was insufficient to show that the fire originated from the engine. He said:

"I think the evidence is inconclusive. It is only circumstantial, and the soundest test of the validity of that sort of evidence is that no theory but the hypothesis upon which the conclusion is based can be formed."

In the case now under consideration Lee Cooper testified that he met the freight train which was alleged by plaintiff to have set out the fire to which this suit relates. When he saw the train he was about a mile and a quarter east of Clarksville. It was running at an ordinary rate of speed and seemed to be operated as trains ordinarily are. He saw no sparks or fire, but noticed an unusually thick smoke escaping from the engine. Over the objection that to admit the evidence was to presume that the fire originated from the engine, and on this presumption found the further presumption that the cotton fire originated from sparks set out by the engine and that the evidence was irrelevant, he was permitted to testify as follows: "When I was about a quarter of a mile west of where I saw the train I saw grass burning on the south side of and near railroad track." The witness stated also that he drove in a trot from the time he saw the train until he came to the second fire. He further stated that he did not know how this fire originated, that he did not see it start, but it was burning at the same time the platform fire was burning (Tr., p. 26). H. A. Green, after having testified to seeing one or two fires set out by the locomotive, over the objection of the defendant, interposed as above shown, was permitted to testify that after leaving this fire he went down the railroad track towards home and saw the grass on fire in two other

places. The fires were not extensive, and burned off small patches of grass from one-eighth to one-half acre in size. He did not see these fires originate, but did not know any way they could have originated except from the train (Tr., p. 28). L. A. Rains testified to seeing a fire originate from a freight train about three and one-half miles east of Clarksville. He then testified that the grass was set on fire about the same time about one hundred and fifty yards west of his house, to which evidence the same objection was interposed as heretofore shown (Tr., p. 29).

Possibly the testimony of Rains which was given by deposition was admissible, for he uses the expression "the grass was also set on fire," and the conclusion might possibly be that he intended to say it was set on fire by the locomotive. The same doubt, however, does not attach to the testimony of Cooper and Green. Each of these, testifying as to certain fires, states distinctly that he does not know how they originated. If, therefore, the evidence is permitted, it must be presumed that it originated from the engine, because this had passed a short time before. The plaintiff insists that this presumption shall be made, and after it is made he insists that it must be further presumed from this presumption that the engine set out the cotton fire, and that there was negligence upon the part of the railway company in permitting it to be set out.

It will not do for the plaintiff to argue that the engine probably set fire in these three places because it was seen to set fire in one or two other places, for this is traveling in a most vicious circle. The very point to be established is that the engine through the negligence of defendant set fire to the cotton. Evidence

that it set out other fires is admissible to show this and because such evidence is admissible the evidence given by Cooper and Green was offered. But when this evidence fails to show with certainty that the engine set out these fires, then from the fact that it was shown to set out other fires you are to presume not only that it set out the cotton fire but also that it set out these three fires, and you are then to reason back to the probability that it therefore set out the cotton fire. Such evidence seems to us inadmissible.

II.

The trial Court erred in admitting, against defendant's objection, the evidence of several witnesses to the effect that they "did not know of any opportunity, and saw no opportunity," for plaintiff's cotton to take fire except from defendant's engine.

At the trial defendant's objection to such testimony was overruled (Tr., pp. 25, 28), and the objection was preserved in the Seventh assignment of error (*ante*, p. 6).

Lon Martin testified: "I do not know of any opportunity for the cotton to have caught fire except from the locomotive" (Tr., p. 25). Aydelote (Tr., p. 25), Taylor (Tr., p. 26), and Deaver (Tr., p. 28), testified to the same effect. When the evidence was offered defendant objected to its introduction, because it was of a negative character and was irrelevant, and in the

nature of a conclusion of the witnesses to the effect that the fire did originate from the engine. These objections were overruled and the evidence admitted (Tr., p. 28).

The action of the Court in admitting this evidence seems to us to have been error. One of the very questions for the jury to determine was whether or not the fire which consumed the cotton originated from the engine. The statement of the witnesses was of an entirely negative character, demanding many collateral inquiries. Furthermore, it was the nature of a conclusion or opinion of the witnesses. They had told about the passing of the engine and the method in which it had passed the cotton, and were then permitted to say that they saw no opportunity, other than this, for the cotton to catch fire. It seems to us that they should have described the circumstances and have left the jury to draw the conclusions.

III.

The Court erred in permitting the hypothetical question as to the equipment and operation of the engine to be put to the witness, Wells, and the answer to be returned.

See the eighth assignment of error and the objection overruled by the trial Court (Tr., pp. 34, 35).

C. N. Wells was placed on the stand by defendant as an expert, and testified that no spark-arrester had

been made which would entirely prevent the escape of sparks. He said:

"A perfect spark-arrester cannot be made and allow the engine to generate sufficient steam to move a reasonable train over a railway."

He further stated that the extension front end spark-arrester, such as was used on the engine which is alleged to have set fire to plaintiff's cotton, was the best spark-arrester. He then testified at length explaining the construction and operation of this system for arresting the escape of sparks and fire (Tr., p. 34. On cross-examination he stated that he had not examined the special engine in question. He was then asked:

"Suppose an engine should come along, and in the course of four and a quarter miles should set out say eight fires, should set fire to the grass in some of these places, set fire to shavings sixty feet from the right of way, set cotton on fire, and that live cinders could be seen falling and did fall and smoked after falling on the ground, over work benches and things, and over platforms, would you say there was anything wrong about the operation or construction of that engine, or would you say it was all right; and suppose, instead of being eight fires, there were five under the conditions named to you, what would you say?"

To this question and the evidence sought to be elicited defendant objected because the evidence was not such as was the subject of expert testimony, but the endeavor was to substitute the conclusion of the witness for that of the jury, and it was not allowable, by a hypothetical question such as this, and the answer thereto, to prove the bad equipment of the engine, in the face of the actual testimony that the equipments were in good order. The objections were overruled and the witness permitted to testify as follows:

"An engine that will do as you have stated is doing something unusual, very unusual. If there was dry

and combustible material close to the track, a spark from the ash pan might drop among it and set fire to it. What you said might have occurred, but it would be very unusual. I couldn't say that there would be anything wrong about the operation of the engine, but there might have been something deranged about the ash pan is the only way I could account for it. If the engine did set out sparks in the manner stated by you I cannot believe that the engine was in quite perfect condition" (Tr., p. 35).

The subject of expert testimony, and when such testimony is admissible, is often a vexatious one. We think we can say, however, that it is never allowable by the introduction of such testimony to substitute the conclusion of the witness for that of the jury. We do not mean to say that an expert witness may not testify at times to things that the jury are to find. What we do mean to say is this: That it is not permissible to allow an expert to give the ultimate conclusion to be drawn from a given state of facts; that is, the final conclusion at which the jury is to arrive from all the evidence.

We can possibly make our meaning clear by an illustration. A rope has broken. The question for the jury to decide is as to whether or not the rope was in good condition for the use to which it was put. An expert could testify as to the resisting power of the textile fabric of which the rope was made. He could testify as to the weight which a rope of this material, of a given dimension, would sustain, if the material was sound. He could testify as to whether or not the rope being dry or wet would have any effect upon its resisting capacity. But if, after he had testified to all these facts, he was asked whether or not the rope in controversy, which had broken under a given strain was in good condition, that being the question at issue, his

testimony would not, we think, be admissible. That is the very question for the jury to decide—the ultimate conclusion to be drawn from all the evidence. With the facts before them, it is for them to say whether the condition was good or bad.

The illustration we have made is suggested by the case of *Hunt vs. Kile, 98 Fed. Rep., 49.* There the question was as to whether or not a certain anchor rope was sufficient. Concerning this the Court use the following language (p. 52):

"It was of course proper for the plaintiff below to prove, if he could, that it was not usual or customary, in such work, to use a manila rope for an anchor rope. It was also competent to show as a fact, that the rope employed was of sufficient strength to sustain the strain to which, in the execution of the work, it would probably be subjected. He had also the right to show, if he could, that the rope was old, defective or worn. But these things must be proven as facts, and they are not difficult to be ascertained. The breaking strength and safe working strength of a manila rope is not a question of speculation or of opinion. These things are determined accurately by tables recognized all over the civilized world, the result of practical tests and of long and extended experience. The jury, if the evidence be conflicting, was the proper tribunal to determine the sufficiency of the rope for the purpose for which it was used, and whether in so supplying that rope the master had failed in the duty which he owed to his servant. The province of the jury in this regard can not properly be invaded by witnesses expressing their opinions upon the very subject which it was the duty of the jury to determine. The witnesses for the plaintiff below were severally asked their opinions upon a hypothetical description of all the appliances, somewhat in this form: 'Whether, in your opinion, that was an ordinarily safe and proper apparatus for the work for which it was used.' This question, in our judgment, was clearly improper. It invaded the province of the jury, and called for the conclusion of the witnesses upon ascertained facts. This was not a question of science, but one upon which, the facts being ascertained, the ordinary and uneducated mind could form an opinion."

In the case of *Crane vs. Columbus Construction Company, 73 Fed. Rep., 984*, the question was whether certain gas pipe that was furnished and laid was of such character and so placed as to stand a certain pressure. Referring to this the Court say (p. 989):

"Upon the question whether the pipe was handled carefully and properly laid, witnesses who supervised or participated in the work were permitted to testify that, in their opinion, the workmen were skillful, and the work well done. It was competent, we think, to show that men of experience and skill were employed upon the work; and doubtless, in such a case, a witness may be required to state what defect, if any, he saw in the work, or what carelessness or lack of skill in the manner of its execution; but the general question whether the line or lines of pipe had been laid with proper skill and care was not one, we think, to be determined upon the opinion of witnesses."

The case of *Electric Equipment Company vs. Blair*, cited *79 Fed. Rep., 896*, was a case for damages on account of injuries inflicted by the negligence of the defendant in hoisting pipes. It was proposed to prove by a witness that in the proper performance of the duty of hoisting a pipe it was necessary that there should be bagging attached to the end of the pipe. The evidence was excluded. In passing upon the propriety of the exclusion the Court say (p. 898):

"It is well understood that the opinions of experts can be given upon questions of science, art, nautical skill, and the class of subjects which require, in order to be understood, special knowledge and study, and in regard to which the jury would therefore be in a state of uncertainty without the aid of those who have been specially instructed *(Transportation Line v. Hope, 95 U. S., 297)*. Especially is this true when the knowledge is attained by reasoning rather than by descriptive facts *(Schwander v. Burge, 46 Hun, 66)*. So that the mere fact that the opinion of an expert may be upon the question which the jury is to decide is not sufficient to exclude the testimony; but there is a very large class of practical questions

upon which a jury is perfectly competent to decide, after having become acquainted with the facts as they existed at the time of the transaction, and in the history of the subject to which the questions relate. For example, the witness could properly state the relative efficiency of different methods of hoisting pipe; but when he was asked to state whether it was necessary, in the proper performance of duty, to attach bagging to the end of the pipes, he was asked the question which the jury could determine upon a statement of simple facts. The province of expert testimony is well stated in Schwander v. Birge, *supra*, as follows: 'The governing rule declared from the cases permitting the opinion of witnesses is that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which exist in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject, so as to possess them with a full understanding of it.' So, also, if the facts can not be adequately placed before the jury so as to impress their minds as they impress the mind of a competent, skilled observer, expert opinions are allowed."

In the case at bar, a full description of the engine and its workings were given. The witnesses testified fully as to the facts concerning the fire, and other witnesses testified as to the condition and the operation of the engine. The firemen and engineer testified as to their care in its operation (Tr., pp. 31, 32). A. A. Campbell, who had no connection with the defendant, examined the engine within a few hours after the fire. There has been no repairs upon it. He found all the appliances in good condition, and from his experience with railroad locomotives and his knowledge of the appliances used for the purpose of arresting sparks, he considered the engine safe for the the purpose of arresting sparks (Tr., p. 31). Traver testified to the same effect. He found all appliances in first class condition. They were of the best approved

pattern for the arresting of sparks among persons familiar with the subject (Tr., p. 31). Seegar testified that all the appliances for the arresting of sparks were in perfect condition (Tr., p. 33). Testimony to the same effect was given by W. W. Laing (Tr., p. 33).

In a word, the witnesses testified fully as to what was shown by an actual examination of the appliances for arresting of sparks, and the evidence entirely failed to show that there was anything the matter with them. As stated, their construction was explained to the jury. We think the ultimate conclusion was with them, and it was not permissible by a hypothetical question to place before them the conclusions of the witness Wells.

The impropriety of admitting this evidence is further shown by the testimony of the witness on re-direct examination, wherein he stated that if an engine had set out five fires or eight fires in running a short disance over a track, at a distance of a few feet from the track, he would believe that it was out of condition, but if an actual examination showed its condition to be good and proper, then he would not believe that the engine was in bad condition. The witness added :

" The velocity of the wind and the condition of the atmosphere govern the distance that a fire would be set out from the track. Engines in perfect condition very often set out fires." (Tr., p. 35).

In *Hunt vs. Lowell Gas Light Company, 8 Allen, 169*, the Court say :

" The object of all questions to experts should be to obtain their opinion as to the matter of skill or science which is in controversy and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts."

The evidence of Mr. Wells, especially wherein he expresses the conclusion that he could not say that the engine was in quite perfect condition under the circumstances stated in the hypothetical question, was not merely his opinion as to a matter of skill or science, but was his declaration upon the effect of the evidence.

IV.

The Court erred in permitting the plaintiff to read the deposition of the witness Caperton, when the witness was actually in Court and his presence was known to the plaintiff.

The deposition of B. F. Caperton had been taken by tee defendant. A portion of it was offered by the plaintiff (Tr., p. 37). The witness at the time was in the court and plaintiff knew the fact. A mistake had keen made in the taking of his depositions, and on a former trial of the case he was present and had then testified that there was such mistake (Tr., p. 38). Yet, though plaintiff knew there was a mistake in the deposition, and though the witness had been present on a former trial and testified that the error was made, he was permitted against the defendant's objection and exception to read the deposition.

The practice in the Federal Courts is to always have witnesses present when practicable. This is so true, that notwithstanding the State laws, if a witness lives within the jurisdiction and within one hundred miles of the place where the Court is held, his deposition

cannot be taken. Here the question of the residence of the witness was waived, but it was insisted that when he was in Court, he should have been put on the stand and that the deposition should not be read.

If the Court had the discretion to permit the reading of the deposition, we do not think it was soundly exercised, especially in view of the fact that upon a former trial of the case the witness had explained that there was error in the deposition. This fact was known to plaintiff and known to the Court. The error of the Court was not cured by Caperton's subsequent examination by the defendant.

V.

The Court erred in submitting to the jury the issue that if defendant failed to use the most approved spark arresters, and plaintiff was free from contributory negligence, he could recover.

Tenth Assignment of Error *(ante,* p. 8).

There was not a scintilla of evidence going to show that the most approved spark arresters were not used, on the contrary the entire evidence showed that the spark arresters were of the most approved pattern. As to this there was no question. Van Housen testified of the engine :

> " It was an extension front end engine and had the same kind of spark arrester in general use. * * * When the front end was opened, the netting was the same kind that was in use on all

engines of the T. & P. and was considered the best (Tr., p. 32).

Seeger testified :

> " I examined engine 182 of the T. & P. road with regard to the condition of the appliances for preventing the emission of sparks and with regard to the ash pan. This engine was what is known as an extension front end, and is one of the most approved pattern for the prevention of the escape of sparks and in general use as such on all the leading railroads " (Tr., p. 33).

Campbell testified :

> " Engines with appliances for the arresting of sparks, such as this, are in common use on railways and are approved for arresting sparks. They are used on seventy-five per cent. of railways and are considered the best by people familiar with the operation of railways for the purpose of arresting sparks " (Tr., p. 31).

Wells testified :

> " I have a wide acquaintance with spark arresters and the various patterns used. There is none to my knowledge that has been invented that will entirely prevent the escape of sparks. The extension front end and straight stack, such as is used on the Texas & Pacific is the kind used on three-fourths of the railways in the Union, and is the most nearly a complete spark arrester of any that has been invented " (Tr., p. 34).

All of these witnesses were thoroughly familiar with the subject and competent to testify in reference thereto. To repeat, the evidence did not remotely raise the issue of whether the spark arrester was not of the most approved pattern, yet with it so standing, the Court charged the jury

> " But if the company failed to use the most approved spark arresters and apparatus connected

with the engine as in ordinary use by properly connected railways to prevent the escape of fire, in so far as consistently could be done with the business they are conducting, it would be an act of negligence, and if under the evidence the defendant was negligent in this particular, and Mr. Watson was not guilty of contributory negligence in allowing his cotton to be stored where it was, or in other matters with regard to it, and because of such negligence fire was communicated to the cotton, then you will return a verdict for the plaintiff " (Tr., p. 39).

This is demonstrably erroneous.

We think there is no rule with regard to the charging of the jury better established than this,—that the Court must not submit abstract questions of law not made by the evidence, and must not submit issues not warranted by it. Should it do it, and should there be any reason to believe that such action may have influenced the verdict, then is there error for reversal. In this case, notwithstanding the evidence, and in the face of uncontradicted evidence, the Court left it to the jury to say whether or not the spark arrester was an approved pattern, and told them if it was not they might on this ground return a verdict for the plaintiff, if he was not guilty of contributory negligence. This permitted the jury to disregard the evidence and to go into the field of conjecture, and it is impossible to say that they may not in such conjecture, have concluded that some other pattern of spark arrester should have been adopted. They may have conjectured that there were others which would more effectually prevent the escape of sparks. We do not think that a charge thus bringing an issue into the case not made by the evidence can be held to be other than erroneous.

In the case of *Railway vs. Minnick, 61 Fed. Rep., 635*, and decided by this Court, where it was alleged

that fire escaping from an engine was communicated to a bridge, weakening it and rendering it defective, and where it was charged that the engine was dangerous and defective and out of repair and that the bridge was also defective and out of repair, the Court charged the jury, among other things:

"If the jury believe that the defective and dangerous engine set fire to a bridge on the line of railway of defendant and thereby rendered such bridge unsafe and dangerous and unfit for the purpose for which it was used by defendant, and thereby caused the death of W. W. Minnick," * * *

then in a certain event it would find for plaintiff. The United States Circuit Court of Appeals, reversing the case, say:

"The pleadings alleged generally that the engine complained of was dangerous, defective and out of repair, but there was no proof tending to show any want of repairs in this engine or any defect in it or any element of danger in it other than such as arose from its being constructed with a Brown stack."

Then, after showing that the engineer who was killed knew that the engine was of this construction and assumed the risk of it, the Court held that the above charge was unwarranted by the evidence and reversible error.

VI.

The Court erred in refusing to charge the jury that plaintiff in placing his cotton upon the platform assumed the risks which were to be anticipated from engines properly equipped with appliances for prevent the escape of sparks and properly operated, and in saying to them that contributory negligence and assumed risk amount to the same thing.

The eleventh assignment of error (Tr., p. 55 and *ante*, p. 8) raises this point.

This is a vital point in the case. No one can read the evidence in this case without reaching the conclusion that if there was any negligence on the part of any one it was the negligence of the plaintiff and of O'Neal the bailee of the plaintiff and the owner of the cotton platform in leaving the cotton exposed and unprotected from fire.

The defendant requested the Court to charge the jury that when Mr. Watson placed his cotton in proximity to the railroad track, he assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks, and properly operated, and if the cotton was destroyed because of the risk so assumed he could not recover. The Court declined to give this charge, or any charge on the question of assumed risk other than the following: When this charge was requested he said to counsel that he assumed that contributory negligence and assumed risk were the same thing; that he could state that if Mr. Watson placed his cotton on the platform

without protection or care of it, and that was an act an ordinarily prudent man would not have done and such act contributed to the injury, he could not recover; that further than this he did not appreciate the doctrine of assumed risk, and then said to the jury:

"As stated, gentlemen, on the question, either call it assumed risk, or contributory negligence, if there was contributory negligence in placing the cotton where it was placed, and, as stated before, in determining whether or not there was contributory negligence or not, you are to apply the rule as to what a reasonably prudent man, a man of ordinary prudence, would do under like circumstances, whether or not he would place the cotton there and leave it there in the condition it was left. If you find that a man of ordinary prudence would have done it, then, no matter whether it is called assumed risk or contributory negligence, it would debar plaintiff from recovery" (Tr., p. 40).

There can be no sort of doubt that assumed risk and contributory negligence are altogether different things. It is true they are frequently confused by Courts, and it is equally true that at times such confusion leads to error. In a case such as this they should by no means be confused, but the Court should clearly and distinctly charge on these two phases of the evidence. In declining to tell the jury that plaintiff assumed the risk of fire from engines properly equipped and handled when he placed his cotton where it was, and in further telling the jury that this assumption of risk would not debar him of recovery unless it was contributory negligence, there was affirmative and hurtful error. If the plaintiff placed his cotton where it was placed, and if the engines were properly equipped and handled, then he was debarred of recovery, irrespective of any question of negligence, and the Court upon request of defendant should specifically have so told the jury. The evidence showed that

no spark arrester has been invented which will entirely prevent the escape of sparks and fire. It showed that with the best approved spark arresters, in the best condition, and with the engines properly handled, fire will yet frequently escape from the engine and be communicated to property adjancent to the railway. He who placed his property in proximity to the railway assumed the risk of fire so communicated, although he may have been guilty of no contributory negligence. To say to the jury that he did not assume the risk of fire thus to be communicated unless he was guilty of contributory negligence in placing his cotton where it was, was confusing and misleading.

In the case of *Briant vs. Railway, 104 Mich., 307*, the Court below charged the jury:

"The plaintiff, or his grantees, having erected the mill in close proximity to the railroad track, he must be held to have known of the risks incident thereto, and if there was a special risk, arising from no want of care in the proper equipment and management of the engine in question, then the risk is not chargeable to the railroad but is an incident to the situation, and plaintiff cannot recover."

And yet further charged:

"The plaintiff, having established himself along the line of defendant's right of way and in close proximity to its track where its locomotives would be expected to run, assumed all the risks incident thereto; and if this fire occurred from no want of care in the proper equipment and management of its engines and trains, then such fire is not chargeable to the defendant, and the plaintiff cannot recover."

On appeal the Court approved these charges and said:

"It cannot be said to be negligence *per se* to erect such a building in close proximity to the railroad track, but, as said by the court below, the plaintiff having

erected it there, knowing the circumstances, he must be held to have known the risk incident thereto, and if there was special risk arising from no want of proper equipment of the engine, and the engine was properly managed, the risk would not be chargeable to the defendant, but is an incident to the situation, and the plaintiff cannot recover."

In *Chicago & Alton R. R. vs. Pennell, 94 Ill., 448,* it was said:

"One who builds a hotel near a railway track assumes the hazards connected with the use of the railway, and must use a higher degree of care in providing means to protect his property from fire than a person in a less exposed situation."

See, also, *passim, Hartford Ins. Co. vs. Chicago & A. Ry., 175 U. S., 91, 99.*

Many authorities are to be found in the line of the Briant case, cited above, but we think it needless to encumber this brief with them. There is no doubt that there is a marked difference between assumed risk and contributory negligence, and, as we believe, there can be no doubt that he who places his property near a railway, where engines are constantly passing, assumes all risk of the communication of fire to that property from engines properly equipped and handled. It is held by the great majority of authorities that he who places his property near the railway track does not have to anticipate negligence on the part of the railway and guard against this, but it is held by none, so far as we know, that he does not assume the risk to be anticipated from the communication of fire from engines operated with care and properly provided with appliances for preventing the escape of fire.

VII.

The Court erred in refusing to admit in evidence the stipulations and exemptions contained in the lease under which O'Neill held possession and occupancy of the platform.

See Twelfth Assignment of Error (Tr., p. 55 and *ante*, p. 10).

The platform was largely on the right of way of defendant, and the fire originated on a part of the platform situated on the right of way. This right of way was held by O'Neill by mesne conveyances under leases made by the Texas and Pacific Railway Company, which contained the following stipulation :

"Such lessee does hereby release the Texas & Pacific Railway Company from all liability on account of any loss or damage by fire, whether occasioned by sparks from locomotives or otherwise" (Tr., p. 30).

The leases are shown at length in the record at pages 17, 18. The stipulations in the lease were offered. When they were offered, it was stated that defendant could not prove that Mr. Watson knew of the terms of the lease, but, on the contrary, the evidence would show that he did not know of such terms ; but in connection with the stipulations of the lease as offered, it was offered to be proved that O'Neill held the right of way subject to the terms and stipulations of the lease, and Mr. Watson had stored his cotton on the platform under the control of O'Neill, leaving it there under such control until such time as it might be sold or shipped (Tr., pp. 29, 30). The introduction in evidence of the leases and stipulations above shown was

objected to, because the leases did not purport to release the railway company from any damages except such as the lessee might sustain, it not being contemplated to release the railroad from damages to other parties; because the contract was against public policy, and void in so far as the railroad company undertook to contract against its negligence; and because it did not appear that plaintiff had any notice of the terms of the lease, and this particular stipulation would not be binding upon him in the absence of such notice, he not being a party to the lease; and because, further, the evidence was immaterial, irrelevant and incompetent. The objections were sustained and the lease excluded (Tr., p. 30).

That the lease was valid and binding as between the railway company and O'Neill: that it was not against public policy is plainly shown by the case above cited. The only question is, as to whether or not Mr. Watson would be bound by its terms. The reasoning of the case of the *Hartford Ins. Co. vs. Ry. Co., 175 U. S., 91*, would seem to lead to the conclusion that he would be. The lessee had no right to come upon the right of way of defendant except upon such terms as might be agreed upon between them. The agreement was that if he came there he came at his own risk as to the communication of fire to his property from passing engines. A consideration for the execution of the release was that the defendant railway should be released from damages by fire so communicated. As we have seen, this agreement was valid, binding and not in contravention of public policy. When Mr. Watson placed his property in the hands of O'Neill, O'Neill became his agent, his bailee. He had a special property in the cotton, and if it had been

negligently destroyed by fire by some person other than defendant, he could have sued such person for damages and recovered. He was, so to speak, the special owner of the cotton. He was the person handling, controlling and managing it. He held it for Mr. Watson and left it where it was. He placed it upon the right-of-way of defendant, or, at least upon a platform partially situated upon such right-of-way, and in contiguity with cotton on that right-of-way, where the fire originated. He had the right to place where it was only under the agreement with defendant. When he so placed it there, and when he had stipulated that defendant should be released from damages for the communication of fire from passing engines, the stipulation and agreement was binding not only as to property specifically owned by him, but also, as we submit, as to property in which he had a special ownership and which was placed where it was by virtue of the terms of the lease.

We submit that there was error in the judgment, and we pray that it be reversed and the cause remanded.

Respectfully submitted,

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for the Railway Company.

FILE COPY.

Office Supreme Court U.
FILED
APR 3 1903
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States,

OCTOBER TERM, 1902,

NO. 223.

TEXAS & PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR.

VS.

SAMUEL E. WATSON,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

J. W. BAILEY,
E. S. CHAMBERS and
AMOS. L. BEATY,
Counsel for Defendant in Error.

Supreme Court of the United States,

OCTOBER TERM, 1902,

NO. 223.

TEXAS & PACIFIC RAILWAY COMPANY,

PLAINTIFF IN ERROR.

VS.

SAMUEL E. WATSON,

DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

REPLY TO ASSIGNMENTS III, IV, V AND VI.

There was no error in allowing witnesses to testify to fires other than the cotton fire, although they did not see them start, when such other fires were shown to have commenced burning almost immediately after the passing of the locomotive that is claimed to have set out the cotton fire.

Railway vs. Richardson, 91 U. S. 454.

Butcher vs. Railway, (Cal.) 8 Pac. Rep. 176.

Railway vs. Donaldson, 73 Tex. 124; 11 S. W. Rep. 164.

Railway vs. Kreig, (Ind.) 53 N. E. Rep. 1035.

Railway vs. Keith, (Ind.) 35 N. E. Rep. 298.

Railway vs. McCorkle, (Ind.) 40 N. E. Rep. 27.

Railway vs. Middlecoff, (Ind.) 37 N. E. Rep. 27.
Wiley vs. Railway, 44 N. J. Law 247.

The suit was for the value of cotton destroyed by a fire alleged to have been set out by a locomotive, and the facts pertinent may be briefly stated: A freight train of plaintiff in error was passing the cotton going east when the fire started. The engine had passed but the caboose was not yet opposite the cotton. Steam was being worked and the locomotive was puffing. A strong wind was blowing from the north and a dense smoke from the engine blew towards the cotton, which was located about fifty feet south of the track on which the train was moving. Sparks and live cinders were seen escaping and falling at this time. (Record, 23-27.) H. A. Green testified that he was on the railroad about three miles west of Clarksville, where the fire occurred, and that as this train passed him half an hour before the cotton fire there were fire and sparks escaping from the locomotive and that cinders fell around him and on him and set the grass on fire about 25 or 30 yards from him and about 30 feet south of the railroad track. (Record 28.) L. A. Rains was also west of town and saw this train pass. He testified that it set the grass on fire near him and about 40 or 50 feet south of the track. (Record 29.)

In this connection James Aydelot, who was at the oil mill in Clarksville, and about 360 feet east of the cotton, was permitted to testify over objection that as this train pulled out it set fire to shavings at the oil mill 60 feet south of the track and dropped cinders on a work bench and on the ground, and

defendant in error was permitted to prove by the witness Green that after leaving the grass fire, which he saw set out, he went down the railroad track and saw grass burning in two other places about 30 feet from the track, that he did not see these fires start, but that they were on the same afternoon as the cotton fire and immediately after the train passed. He was also permited to prove by the witness Rains that in addition to the fire he saw started by the engine he saw a fire burning about the same time in the grass some 40 feet south of the track and another about 60 feet, and Lee Cooper was allowed to testify to seeing grass burning east of town near the track and on the south side just after the same train had gone. The admissibility of the proof of these fires, when the witnesses did not see the very sparks in the act of igniting the grass, is the question raised.

Railway vs. Richardson, supra, is decisive of the admissibility of proof of other fires when there is no question as to how they originated.

The argument that when the witness did not see the fires start, to admit this proof is to allow presumption to be founded upon presumption, is commendable only for ingenuity. If proving the other fires merely established collateral facts the objection would have more force, but the proof tended circumstantially to establish the main fact and to bring home a conviction as to the matter in issue. The mind naturally accepts this kind of testimony as some proof and unless artificial rules have intervened it will surely be held admissible.

Butcher vs. Railway, supra, decided by the supreme court

of California, is in point, and it will be seen that the evidence offered there was much more remote and less cogent than that in the present case. The following extract from the opinion states the point and the conclusion of the court: "At the trial of this cause a witness, Sherman Marshall, was permitted, notwithstanding the objection of defendant, to testify that about two weeks after the fire which is alleged to have burned plaintiff's property, (at a place from a quarter to one-half a mile distant from the spot where the fire in question here was kindled), he saw fire in a field near defendant's road, just after a train of cars had passed, drawn by the same engine from which, as claimed, the fire escaped which caused the damage sustained by plaintiff. Evidence that sparks and coals were frequently dropped by engines passing upon the same road upon previous occasions has been held to be relevant and competent to show negligence and to make it probable that the plaintiff's injuries proceeded from the same quarter. * * * In the aspect of the case most favorable to defendant, there is no evidence in the record that the fire which caused the destruction of paintiff's crop was caused by defendant's engine, other than the fact that the fire commenced, or was seen, very soon after the engine passed, and that a high wind was blowing. As an inference from these facts, considered with or without evidence as to the character of the engine, its management, etc., the jury may have been authorized to find that the engine caused the fire. Conceding evidence that engines of defendant communicated fire to other property on other occasions would tend to show negligence, and to render it more

probable that the fire was, in this case, so communicated, can facts from which a similar inference might be drawn give greater force to the *inference* that the fire which destroyed the plaintiff's property came from the defendant's engine, because the engine had just passed and a wind was blowing? The witness did not swear that, on the occasion to which he testified, he saw sparks issuing from the smoke stack. Certainly such evidence approximates very closely the line which separates evidence merely collateral and independent from the evidence bearing upon the issue made by the pleading. It may be said to be an attempt to add to a probability by another probability; to support an inference by an inference. Yet if it is permissible by direct proof to show that other fires were caused by defendant's engines, is it not permissible to show facts tending to prove that other fires were so caused? If many fires had occurred along the line of defendant's road under circumstances like those appearing in the present case, the fact would have tended to show negligence in the management of defendant's business, and that this particular fire was started by the locomotive. Proof of a single fire should have much less weight than proof of many fires, but we cannot say it was absolutely irrelevant."

In *Railway vs. Donaldson, supra,* the supreme court of Texas had occasion to pass on this question. The issue was whether the defendant with its engines had negligently set fire to the plaintiff's grass. It was held that if the evidence *tended* to show that other fires were started by the company's engines it was permissible to prove them, but that it was not proper to prove a fire that the evidence did not *tend* to show

was attributable to the engine. The court, through Chief Justice Stayton, said: "The evidence of the witness, however, as to other fires was not confined to such fires as were shown to have arisen *soon after defendant's engines had passed*, or as were shown to have resulted from the escape of fire from engines of defendant but referred to fires generally, which may have occurred from the negligent or wilful acts of others." (The italics do not appear in the opinion.)

The other cases cited above all affirm the admissibility of proof of other fires when it is shown that they are seen burning just after the train has passed. And it is submitted that no case can be found holding that, in order to prove such other fires the witness must actually see the spark descend, observe the process of combustion, and behold the flames spring forth, which is the effect, logically, of the railroad's contention. It will not do.

REPLY TO ASSIGNMENT VII.

The objection made to the testimony of witnesses to the effect that they saw no opportunity and knew of none for the cotton to have caught fire except from the locomotive, was properly overruled.

Pullman vs. Smith, 79 Tex. 479; 14 S. W. Rep. 993.

It being proper to exclude, by proof, the probability of the fire having originated from agencies other than the engine,—and proof of this character is, under some circumstances, essential,—the evidence introduced was certainly relevant

and material. The remaining ground of objection is that the evidence was in the nature of a conclusion of the witnesses to the effect that the fire did originate from the engine. It will be observed that no objection was made on the ground that the statements of the witnesses involved a conclusion as to what would be the absence of an opportunity. The point was not made that the witnesses should state whether they saw any one near the cotton, and if so whether with matches or lighted pipes, or whether there were any fire flues in the vicinity, leaving it for the jury to say whether these would have been opportunities or their absence the lack of opportunities. That was not the objection. It was urged merely that to prove the absence of other opportunities, *as a fact,* would involve the giving of a witness' opinion that the fire was kindled by the engine. Counsel were doubtless mindful that almost any statement embraces conclusions to a certain extent. The statements that the train was a long one, that it was running slow or fast, that it was puffing hard, and the like, and even the fact that it was a freight train, were all conclusions in a sense, and in the same sense that saying a certain thing is or is not an opportunity for fire; so the objection was not made except as stated. If it be conceded that the statements in question implied conclusions by the witnesses that the passing of the engine was an opportunity for the cotton to catch, still, it does not follow that they implied that the cotton did catch in that way, but at most only that there was an opportunity of that kind, and there is no dispute that the passing of this engine was in fact an excellent opportunity. Moreover, if by any process of refined distinctions an error could be spelled out of

this ruling it would not be one for which the case should be reversed, because the evidence was overwhelming that the fire did originate from the engine and was in fact so conclusive, without the testimony now being discussed, that the minds of reasonable men could not have differed as to that, though it may be conceded that it was otherwise on the issues of negligence and contributory negligence.

Pullman vs. Smith, supra, by the supreme court of Texas, seems to be a case in point and is decisive even if every construction that might be contended for by plaintiff in error were to be placed. There the plaintiff's wife had been injured through the negligence of the Pullman Palace Car Company, her health had become impaired, and one of the issues in the case was whether such impairment was due to the injury received at the hands of the company. In answer to a question she was allowed, over objection, to state: "I know of nothing else that could have caused my illness except the exposure to which I was subjected on the morning when I got off the train." Held, no error.

REPLY TO ASSIGNMENT VIII.

It was proper to allow the hypothetical question put to the company's expert witness, Wells, on cross examination

Transportation Line vs. Hope, 95 U. S. 297.

Railway vs. Price, (C. C. A.) 97 Fed. Rep. 425.

Railway vs. Novak, (C. C. A.) 61 Fed. Rep. 579.

12 Am. & Eng. Enc. Law (new ed.) page 472.

1 Greenleaf on Evidence sec. 440, 440a.

2 Taylor on Evidence sec. 1275.

Taylor vs. Star (Iowa) 81 N. W. Rep. 251.

Williams vs. Railway (Minn.) 37 L. R. A. 204.

On authority of the two last cases cited and many others that could be found it might properly be held that in-as-much as the witness was in the employ of the railway company and was placed on the stand by it, and that too as an expert, he could be asked the question complained of for the purpose of testing his knowledge and credibility and of determining his interest or partiality. This cannot be better illustrated than by the answer he gave. After having qualified as an expert and testifying at length explaining the construction and operation of engines and spark arresters and that he had charge of that particular part of the company's business, he gave it as his opinion that a perfect spark arrester cannot be made. He was then cross examined. On this cross examination he admitted that allowing the fire in an engine to burn low and then opening the throttle, or permitting the spark reservoir to become filled, or the ashes to accumulate in the ashpan would tend to make an egine throw more sparks. He was then asked the hypothetical question as to whether an engine properly constructed and properly operated would do as this one was shown to have done, the facts in evidence being enumerated His reply was evasive and circuitous as follows: "An engine that will do as you have stated is doing something unusual, very unusual. If there was dry and combustible material close to the track a spark from the ashpan might drop among it and set fire. What you have said might have occurred,

but it would be very unusual. I could not say that there would be anything wrong in the operation of the engine, but there might have been something deranged about the ashpan, is the only way I can account for it. If the engine did set out sparks in the manner stated by you, I cannot believe that the engine was in quite perfect condition." Then on redirect examination he proceeded to destroy the effect of the reluctant admission he had made by saying: "A fire can originate from an engine even when it is properly equipped. If I were told that five fires or eight fires were set out from an engine running a short distance over a track at a distance of a few feet from the track I would believe that the engine had something out of condition, but if an actual examination of the engine showed its condition to have been good and proper where the fires were set out, in the face of this evidence I would not believe that the engine was in bad condition." (Record 35.) Here on redirect examination is where he gave his opinion on the effect of evidence and yet plaintiff in error has the hardihood to complain.

But suppose Mr. Wells had been introduced by defendant in error and the hypothetical question had been asked on his examination in chief, would it not have been proper?

It is well settled, and the railroad company recognized the doctrine by placing its expert on the stand, that in matters of this particular kind the opinions of experts are receivable in evidence. 12 Am. & Eng. Enc. Law (new ed.) 472, and cases there cited.

And the witness may give his opinion on the very issue to be decided by the jury provided it involves a matter on

which expert evidence is admissible and not merely a question the ordinary mind is capable of determining. *Transportation Line vs. Hope,* 95 U. S. 297.

In the case last cited the issue being tried was whether it was negligence for a certain tug-boat to undertake to tug three boats abreast, with a high wind. An expert was asked the direct question of whether such a thing would be safe or prudent. This court said: "The witness was an expert and was called and testified as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask questions of a witness of this class, which cannot be put to ordinary witnesses. It is not an objection, as is asumed, that he was asked a question involving the point to be decided by the jury. As an expert he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is expected to testify. Evidence of this character is often given upon subjects requiring medical knowledge and science, but it is by no means limited to that class of cases. It is competent upon the question of the value of land, *Clark vs. Baird* 9 N. Y. 183; *Bearss vs. Copley* 10 N. Y. 93; or as to the value of a particular breed of horse, *Harris vs. R. R. Co.* 36 N. Y., Supr. Ct. 373; or upon the value of the professional services of a lawyer, *Jackson vs. R. R. Co., 2* Thomp. & C. (N. Y.) 653; or on the question of negligence in moving a vessel. *Moore vs Hestervelt,* 9 Bosw. 558; or on the necessity of a Jettison, *Price vs. Hartshorn* 44 N. Y. 94. In *Welsh vs. Ins.*

Co., 32 N. Y. 427, it was decided that the testimony of experienced navigators on questions involving nautical skill was admissible. The witness in that case was asked to what cause the loss of a vessel was attributable, which was the point to be decided by the jury. The court sustained the admission of the evidence, using the language: 'We entertain no doubt that those who are accustomed to the responsibility of command and whose lives are spent on the ocean are qualified as experts to prove the practical effect of cross seas and heavy swells, shifting winds and sudden squalls.' The books give a great variety of cases in which evidence of this character is admissible, and we have no doubt of the competency of the evidence to which objection is made."

The case at bar, like the one just refered to, is very different from those involving ordinary questions of physics concerning which the average mind is deemed competent to draw its own conclusion. In short, the testimony here was on an issue that was a proper subject for expert testimony, and that being true, it makes no difference that the witness may have expressed his opinion as an expert, on one of the ultimate questions to be decided.

REPLY TO ASSIGNMENT IX.

The trial court properly admitted the deposition of the witness Caperton, although the witness was personally present and could have been called. Or, if there was error it was harmless.

Revised Statutes Secs. 861, 866.

27 U. S. Statutes 7 (Act 1892.)
Whitford vs. Clark 119 U. S. 522.
Hinds vs. Keith (C. C. A.) 57 Fed. Rep. 12.
Schmick vs. Noel 64 Tex. 406.
O'Connor vs. Andrews 81 Tex. 28; 16 S. W. Rep. 628.
Railway vs. Renkin 38 S. W. Rep. 830.
6 Enc. Pl. & Pr. page 570.

While it does not affirmatively appear from the record that the deposition was taken under a *dedimus potestatem* it does appear that it was taken in accordance with the state law. There is no provision in the latter authority authorizing the taking of depositions *de bene esse*, but it is provided that "after the service of the notice of filing the interrogatories has been completed the clerk or justice shall issue a commission to take the deposition of the witness named in the notice." Art. 2279. The objection was not put upon the ground that no commission had issued, but was solely upon the ground that the witness was in court and should be placed upon the stand. So it may be safely assumed, especially in view of the court's ruling and the presumption in favor of the regularity thereof, that this deposition was taken under a commission or *dedimus potestatem*.

Section 861 of the United States Statutes provides: "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

Section 866 provides for the issuance of a *dedimus potestatem* to take depositions according to common usage, and also

stipulates that the provisions of sections 863, 864 and 865 shall not apply in such cases.

The sections 863-865 here referred to are those relating to depositions *de bene esse* and contain among other things a provision that such deposition cannot be used unless the witness is dead or more than one hundred miles from the court, etc. But, as stated, the application of these provisions is expressly excluded, and there is absolutely no statutory restriction or limitation as to the use, when depositions are taken under a *dedimus potestatem*.

Whitford vs. Clark, supra, holds that a deposition taken *de bene esse* is not admissible under such circumstances as existed in the case at bar because of the statute, section 865, providing in effect that it shall not be except when the witness' presence cannot be obtained, but the court proceeds to say: "As to depositions taken under a *dedimus potestatem* in accordance with section 866 of the Revised Statutes, this provision of section 865 does not apply, for it is expressly so enacted in that section."

Furthermore, the act of 1892 provides that in addition to the Federal mode of taking depositions they may be taken according to state law and usage, and section 914 provides that the practice in the Federal courts in common law cases shall conform, as near as may be, to the practice in the state courts.

The circuit court of appeals in affirming the judgment of the circuit court held the ruling to be erroneous but harmless in view of the fact that plaintiff in error afterwards placed the

witness on the stand and he testified fully concerning the matters covered by the deposition. (Record 51.)

REPLY TO ASSIGNMENT X.

The issue of whether the engine was equipped with the most approved spark arresters was properly submitted to the jury.

McCullen vs. Railway, (C. C. A.) 101 Fed. Rep. 66.
Railway vs. Rice, (Tex.) 59 S. W. Rep. 833.
Smith vs. Railway. 55 N. W. Rep. 717.
Babcock vs. Railway 13 N. W. Rep. 740.

Practically all the evidence bearing on this issue has been stated in the first part of the brief, excepting certain testimony that was given by the conductor in charge of the train, Mr. Caperton. It appeared that on modern engines the spark arresting appliance includes a netting which is adjusted in the front end and not in the smoke stack. (Record 30-35.) The witness Caperton in a deposition taken by the company and introduced by the plaintiff testified that he examined the engine just after the fire, referred to it as being in good condition, and said the netting was over the top of the smoke stack. (Record 37.) He was then placed on the stand by the company, and said this was a mistake; that either he or the notary made a mistake for the netting was not on the smoke stack but in the extension front. He admitted that he read the deposition and signed it. (Record 38.)

Though the witness was at best very negligent in giving

testimony, if not in running trains, he may have made an honest mistake—according as the jury may have believed—but it was a question for the jury.

But eliminate this particular testimony and still the issue was raised by the proof showing the manner in which the fire originated and the fact of the other fires.

heading

REPLY TO ASSIGNMENT XI.

The court having charged the jury that the plaintiff could not recover if the defendant's engine was properly equipped and properly operated, even if sparks were communicated to his cotton, it was no error to refuse another charge to the same effect but incorporating, as a reason, that the plaintiff had assumed the risks to be anticipated from engines properly equipped and properly operated.

The special instruction requested might weli have been gve but for the fact that it would have been a repetition. The court had plainly told the jury that the plaintiff could not recover in any event if the company used the most approved spark arresters, kept them in good condition, and operated its engine with ordinary care. (Record 39.) Now, would it have added anything to have appended the following sentence: "*Because* the plaintiff assumed the risks which were to be anticipated from engines with proper spark arresters and properly operated"? What is the difference between saying, "If the engine was properly equipped and operated Watson cannot recover," and saying, "Watson assumed

the risks incident to the proper equipment and operation of the engine, and therefore, if the same was properly equipped and operated he cannot recover"?

The doctrine of assumed risks does not apply here any way. If there had been an engine on the road that habitually threw large volumes of fire and was not supplied with any means of arresting sparks and the plaintiff, knowing of this engine and knowing it would pass, had placed his cotton close to the track, there might be what is technically known as assumed risk, just as when an employe of a railroad knowingly undertakes to work with dangerous machinery. In either case there would be negligence on the part of the road, but no recovery could be had because the risks were assumed. The risks that are assumed within the meaning of the term "assumed risks" are risks from improper rather than from proper operation. Otherwise, since a passenger assumes the risks incident to his voyage from the proper operation of the trains on which he takes passage, and since one also assumes the risks naturally incident to living, it could be insisted that the court should so charge the jury, and thus the term would become superfluous and meaningless. Of course risks from proper operation are assumed, always, and that should be understood without being said.

The learned trial judge was correct when he declined to go further than to give the charge that he gave, including a plain, clear instruction on contributory negligence.

REPLY TO ASSIGNMENT XII.

The trial court was right in excluding the stipulations exempting the railway company from liability, as contained in the lease contracts under which O'Neil held the platform on which the cotton was stored.

McAdams vs. Railway, (Tex.) 45 S. W. Rep. 936.

King vs. Railway, (Cal.) 29 L. R. A. 755.

Ordelhide vs. Railway 80 Mo. App. 507.

It is conceded that defendant in error was no party to the contract and that he had no notice of it or the stipulations in question, but it is contended that O'Neill was in law a party to the contract, that the stipulations were valid and binding as to him and that since the right of defendant in error to store his cotton on the right of way came through O'Neill he must be bound by the release.

The cases cited deal with the proposition and in those cases the question of notice was also involved. They fully recognize the doctrine of *Hartford Insurance Company vs Railway* and make the distinction here contended for. According to their holdings the stipulations would not have been binding on Watson even if he had known of them. In a case like this, however, where there is no notice, it seems really too clear for argument.

It is submitted that at least two of the grounds of objection were well taken, viz.: (1) that the contracts did not purport to release the railroad company from any damages except such as the lessees might sustain, it not being contemplated to release from damages to other parties, and (2) that the plaintiff was not a party to the lease and had no notice of

the stipulation releasing the railroad company from damages.

May the judgment be affirmed.

J. W. BAILEY,
E. S. CHAMBERS,
A. L. BEATY,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 223.—October Term, 1902.

The Texas and Pacific Railway Company, Plaintiff in Error, *vs.* Samuel E. Watson.	In error to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 4, 1903.]

This action was originally commenced in a Texas State court by the appellee Watson, to recover the value of sixty-four bales of cotton, less insurance thereon. The cotton was alleged to have been destroyed by fire on January 3, 1896, while stored upon what was known as the O'Neil cotton platform near the depot of the railway company at Clarksville, Red River County, Texas. The fire was averred to have been occasioned by the negligence of the railway company in the use of a defectively constructed locomotive and in the careless operation thereof while passing said platform. Subsequently the insurance company was joined as plaintiff and recovery was asked of the full value of the cotton. Upon application of the defendant, based upon the fact that it was incorporated under the laws of the United States, the cause was removed to the United States Circuit Court for the Eastern District of Texas. In the latter court an amended answer was filed. This pleading contained general and special demurrers, a general denial and a special answer setting up various defenses. The general and special demurrers were subsequently overruled, and defendant excepted. A trial was had, and it was shown by the evidence that at the point where the fire in question occurred the track of the railway company ran east and west, and the train which it was asserted caused the fire in question was moving eastward, and a strong wind was blowing from the north. A verdict was rendered in favor of the plaintiff Watson and against the railroad and against the plaintiff insurance company in favor of the railroad. Judgment was entered on the verdict; the judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit, (112 Fed. Rep. 402,) and the cause was then brought to this court by writ of error.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the Court.

The various assignments of error relied upon in the brief of counsel for plaintiff in error will be disposed of in the order therein discussed.

First. In several assignments it is claimed that the Circuit Court of Appeals erred in holding that the trial court properly admitted the evidence

of witnesses to the effect that at or about the time of the fire complained of, and about the time of the passing of the locomotive which it was charged occasioned the fire, the witnesses observed other fires at various points not far removed from the place where the cotton was burned and south of and near to the railway track. In the light of the decision of this court in *Grand Trunk Railway Co.* v. *Richardson*, (91 U. S. 454, 470,) we think this evidence was competent as having a tendency to establish that the destruction of the property of the plaintiff was caused by the locomotive in question, and as tending to show negligence in its construction or operation.

Second. In an assignment of error it was contended that the appellate court erred in holding that the trial court properly admitted testimony to the effect that certain witnesses did not know of and saw no opportunity for the cotton to have caught fire except from the locomotive in question. The evidence in the record is in narrative form, and that portion relating to the criticized testimony merely recites that at the time said evidence was offered from each witness "defendant then and there objected, because the evidence was of a negative character and would not be relevant, and further because it was in the nature of a conclusion of the witness to the effect that the fire had originated from the engine." Whether the question which elicited the testimony complained of was objectionable cannot be determined from the record, nor does the objection seem to have been addressed to an omission to state the facts which induced the belief that no other opportunity existed for the cotton to have caught fire than was afforded by the operation of the locomotive. Evidence of the surrounding circumstances and conditions which by a process of exclusion would have tended to establish that the burning of the cotton could not have been caused other than by the locomotive in question would, we think, have been clearly relevant. As the record stands we think the assignment in question was without merit.

Third. A further contention is that the appellate court erred in permitting a question to be answered despite the objection that "the evidence sought to be elicited was not such as was the subject of expert testimony, but the endeavor was to substitute a conclusion of the witness for that of the jury, and it was not allowable by a hypothetical question, such as this and the answer thereto, to prove the bad equipment of the engine in the face of the actual testimony that the equipment was all in good order." The following is the question referred to:

"Suppose an engine should come along, and in the course of four miles and a quarter should set out say, eight fires, should set fire to the grass in some of these places, set fire to shavings sixty feet from the right of way, set cotton on fire, and that live cinders could be seen falling and did fall and smoked after falling on the ground over the work benches and things and over platforms, would you say there was anything wrong about the

operation or construction of that engine, or would you say it was all right; and suppose, instead of being eight fires, there were five under the conditions named to you, what would you say?"

The question was proper. The witness was foreman of the boiler department at the main shops of the defendant, having to do with the building of boilers, and was in special control of the part of the shops which had to do with spark arresters. The hypothetical question was based upon evidence, and if the witness was competent—as the evidence showed he was—to testify whether or not an engine so conducting itself was or was not in good working order or properly operated, we think the jury should have had the benefit of his opinion. Inasmuch as there was evidence to the effect that it is impossible, even with the use of the most effective spark arresters, to prevent the escape of sparks, a case was presented justifying the introduction of expert testimony to aid the jury in determining the ultimate fact whether an engine was in good repair and properly operated which conducted itself as the evidence tended to show this locomotive did. (*Transportation Line* v. *Hope*, 95 U. S. 297, 298.)

Fourth. It is asserted that the appellate court erred in holding that prejudicial error was not committed in permitting the deposition of a witness to be read when the witness was actually in court and his presence was known to the plaintiff. We adopt as our own the language of the Circuit Court of Appeals on this point:

"In view of the fact that the witness was called by the defendant after the deposition had been admitted over the defendant's objection, and gave fully his explanation of the deposition and his testimony as to the subject to which it related, we conclude that the error committed is not sufficiently grave in its results to require us to reverse the case."

Fifth. It is claimed that the appellate court erred in holding that the trial court rightly left it to the jury to determine that if the railway company failed to use the most approved spark arrester, and plaintiff was free from contributory negligence, he could recover. This contention is based upon the assumption that there was no evidence tending to show that the most approved spark arrester was not used. We do not pause to analyze the evidence on the subject, because we think it not necessary to do so. The proposition, considering it in the light most favorable for the plaintiff in error, is but an abstraction, and assumes that because it may be that at one time the spark arrester was of the most approved pattern it continued to be such, even although it was not in good repair at the time of the fire and such defective condition occasioned the loss complained of. The court instructed that the jury must give a verdict for the railroad if it was found that it "did use the most approved spark arrester, at the time in good condition, and that the engine was then and there operated with ordinary care and prudence;" and, in stating the converse of the proposi-

tion, said: "But if the railroad failed to use the most approved spark arrester and apparatus connected with the engine as in ordinary use by properly conducted railways to prevent the escape of fire, in so far as it could consistently be done with the business" which the railroad was carrying on, a verdict should be returned against the railroad, provided it was found that the plaintiff Watson had not contributed to the injury. This charge as a whole we think is not amenable to the objection that it left to the jury to consider the original construction of the spark arrester, irrespective of its condition at the time of the fire. The expression, "as ordinarily used by properly conducted railways," of necessity implied that the apparatus must have been kept in proper condition for use. To construe to the contrary would presuppose that conflicting measures of liability were given to the jury by the court when it pointed out the opposing views which the jury were authorized to deduce from the proof. Thus rightly construing the charge, there was beyond peradventure evidence to be weighed by the jury in determining whether the spark arrester was or was not in satisfactory working order at the time the cotton was set on fire. Several witnesses testified that the engine emitted considerable fire and cinders, and the evidence upon which the hypothetical question quoted in subdivision third of this opinion was based clearly rebuts the assumption that there was not evidence of circumstances to be considered by the jury in connection with the evidence introduced by the defendant of the condition of the engine, spark arrester, &c., as disclosed by an inspection thereof. So, also, the answer to the hypothetical question clearly contained matter pertinent for the consideration of the jury in determining whether the engine was properly equipped and operated. The witness said:

"An engine that will do as you have stated is doing something unusual, very unusual. If there was dry and combustible material close to the track a spark from the ash pan might drop among it and set fire. What you said might have occurred, but it would be very unusual. I could not say that there would be anything wrong in the operation of the engine, but there might have been something deranged about the ash pan, is the only way I could account for it. If the engine did set out sparks in the manner stated by you, I cannot believe that the engine was in quite perfect condition."

Sixth. A further assignment of error is to the effect that the appellate court erred in holding that error was not committed in refusing to charge the jury that plaintiff in placing his cotton upon the platform assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks and properly operated, and in saying to them that contributory negligence and assumed risk amount to the same thing. But the court charged the jury that even though the cotton was set on fire by sparks communicated from the engine, yet if the defendant used the most approved spark arrester and the engine was

operated with ordinary care and prudence, the plaintiff could not recover. As the court also fully instructed the jury as to what would have constituted contributory negligence on the part of Watson as respected the storing of his cotton on the platform, and informed the jury that recovery could not be had if there was such contributory negligence, it is quite clear that the jury could not have been misled by the failure of the trial court to point out the distinction between assumed risk and contributory negligence. It is not perceived, for instance, how the jury could have been aided in reaching a conclusion if, in addition to being informed that the plaintiff could not recover if the railway company was not negligent in respect to the equipment and operation of the engine, they were told that the plaintiff "assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks, and properly operated."

Seventh. The remaining assignment of error is to the effect that error was committed by the appellate court in affirming the judgment despite the fact that the trial court refused to admit in evidence the stipulations and exemptions from liability for loss caused by fire contained in the lease under which the lessee held possession and occupancy of the storage platform on which the cotton in question was when destroyed by fire. As Watson was not in privity with the lessee—and it is conceded he had no knowledge of such stipulations when he stored his property on the platform—there was no tenable ground on which to contend that he was in anywise bound by the stipulations in question.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.